Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term, 1995

ROSE ANN ROTHENBUSCH,

Petitioner

v.

FORD MOTOR COMPANY

On Petition For Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Randolph H. Freking
Counsel of Record
FREKING & BETZ
225 East Sixth Street
Second Floor
Cincinnati, OH 45202
(513) 721-1975

QUESTIONS PRESENTED

1. IS A HOSTILE ENVIRONMENT HARASSMENT PLAINTIFF REQUIRED TO PROVE THE DISCRIMINATORY INTENT OF A CO-WORKER HARASSER?

2. IN A HOSTILE ENVIRONMENT HARASSMENT CLAIM, MAY THE DISCRIMINATORY INTENT OF THE HARASSER BE PROVEN USING A MIXED-MOTIVES ANALYSIS?

3. IN DETERMINING WHETHER TWO EMPLOYEES ARE SIMILARLY SITUATED FOR PURPOSES OF DISPARATE TREATMENT ANALYSIS, MUST THE TWO EMPLOYEES BE SIMILARLY SITUATED IN ALL RESPECTS, OR MERELY IN ALL RELEVANT RESPECTS?

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INTRODUCTION

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above-entitled proceeding on July 20, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has not been reported.

The opinion of the United District Court for the Southern District of Ohio has not been reported.

STATEMENT OF JURISDICTION

Petitioner filed her Complaint seeking damages and injunctive relief for alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, the Ohio Revised Code § 4112.02(A), and for intentional infliction of emotional distress, in the United States District Court for the Southern District of Ohio on December 2, 1991. Jurisdiction of the district court was based upon 28 U.S.C. §§ 1331, 1367.

From February 3, 1993, to February 16, 1993, the claims based on Ohio law were tried before a jury, and the Title VII claims were tried before the court. At the close of Petitioner's case, the court dismissed her claim for intentional infliction of emotional distress.

The jury returned a verdict for Respondent finding no violations of O.R.C. § 4112.02(A), and the court made a

similar finding, dismissing the Title VII claims.

Petitioner moved for a new trial on the state law claims, and the court denied the motion.

Petitioner appealed the case on the merits to the United States Court of Appeals for the Sixth Circuit. On July 20, 1995, the Sixth Circuit issued its opinion affirming the District Court. No petition for rehearing was filed.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

§ 703(A) of Title VII, 42 U.S.C. § 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment

opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Ohio Revised Code § 4112.02(A) provides:

It shall be an unlawful discriminatory practice:

(A) For any employer, because of race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

STATEMENT OF THE CASE

Rose Ann Rothenbusch was first employed by Respondent Ford Motor Company ("Ford") in Fairfax, Ohio, as a clerical worker, in 1973. During her tenure at Ford, Ms. Rothenbusch earned several promotions to higher paying positions. In December, 1976, she was promoted to her first supervisory position. In 1981, Ms. Rothenbusch transferred to Ford's plant in Batavia, Ohio, where she held various "first-line" supervisor positions. As one of only three female supervisors out of a total of approximately eighty supervisors in the Batavia plant, Ms. Rothenbusch was a pioneer for women in an industry dominated by men. Her loyalty and dedication to Ford were never questioned, and her performance evaluations always indicated that her work was satisfactory or better.

In July of 1990, Ms. Rothenbusch and her then-husband, Fred Meyer (also a supervisor at Ford), separated and filed a petition for dissolution of their marriage. Meyer's hostility toward Ms. Rothenbusch soon became evident at work. Meyer expressed his hostility for Ms. Rothenbusch by making degrading, insulting and vulgar remarks to her at every opportunity, including calling her a "whore" and a "slut." He followed her around the plant as she attended to her duties. Meyer also displayed various offensive, degrading and sexually explicit posters and adulterated greeting cards, which contained sexual innuendos, repeated images of a partially nude woman, and other insults aimed specifically at Ms. Rothenbusch, throughout the Batavia plant.

One such poster featured a graphic illustration of a sexual act and an invitation to have sex with "Rose Ann

Meyer" (Ms. Rothenbusch's married name) and that her husband would pay the American Express bill. Ms. Rothenbusch received an adulterated card through the inter-office mail, and another derogatory note criticizing her dress code ("You have gone from Talbot's to a $2 hooker look to now") was left on the windshield of her car in Ford's employee parking lot.

Ms. Rothenbusch registered numerous complaints about Meyer's conduct, including the public display of the sexually explicit posters targeted at her, to James W. Brown, Ford's supervisor of salaried employees. Ford also had notice of the appearance of these posters through several of its supervisors who saw the posters at various locations throughout the plant. Brown interviewed Meyer several times, and Meyer denied all involvement with the display or mailing of the posters, cards and notes. Ford took no other action to investigate Ms. Rothenbusch's complaints.

On May 17, 1991, after nine months of frustration and emotional turmoil, Ms. Rothenbusch filed a formal charge of sexual harassment with the Equal Employment Opportunity Commission ("EEOC") and the Ohio Civil Rights Commission ("OCRC"). In addition, she advised Mr. Brown in a letter dated May 16, 1991 that she intended to file the charge. Plaintiff also advised a supervisor, James Ewing, that she had obtained a mace-like substance to protect herself from Meyer.

Shortly thereafter, on May 19, 1991, Ms. Rothenbusch encountered Meyer during working hours. She claimed that he shouted obscenities at her and made sexually derogatory comments to her, after greasing the seat of her "scooter" earlier that day. During this encounter, Ms.

Rothenbusch became apprehensive of Meyer, so she sprayed his face with the mace-like substance. Ford promptly investigated the circumstances of this incident, and within a month, fired Ms. Rothenbusch.

Only after Ms. Rothenbusch was fired did Ford take any action against Meyer. In October, 1991, Ford disciplined him for violating its sexual harassment policy by issuing him a written letter of reprimand. Meyer suffered no other adverse employment actions.

Ms. Rothenbusch filed suit against Ford, alleging sexual harassment, sex discrimination, and retaliation under both federal and Ohio law. In support of her sex discrimination and retaliation claims, Ms. Rothenbusch presented evidence that Ford referred specifically to her EEOC charge when investigating her encounter with Meyer; conducted a substantially more thorough investigation of Meyer's allegations against her than its investigation of her repeated sexual harassment complaints; considered sexual harassment and assault to be equally serious charges of misconduct; issued only a reprimand to Meyer for sexual harassment and had never terminated any male Ford employees who had committed assaults. The trial judge allowed some evidence on these issues, but excluded other evidence that was critical to Ms. Rothenbusch's claim of disparate treatment.

The trial court instructed the jury as to the elements of a hostile environment sexual harassment claim. To expound on the element that requires the harassment complained of to be based on sex, the court instructed the jury, over Ms. Rothenbusch's objections, as follows:

> To show that the alleged harassment was based on sex, Plaintiff must prove by a preponderance of the legal evidence that but for the fact of her sex, she would not have been the object of unlawful harassment. Harassment is prohibited by Ohio law only if it is based on being male or female. Personal animosity is not the equivalent of sexual harassment and is not proscribed by law.

On the third day of jury deliberations, the jury requested clarification of this instruction. Specifically, the jury asked:

> Does the word "equivalent" infer that personal animosity does not carry as much weight as sexual harassment, or does "equivalent" mean that acts of personal animosity cannot be construed as sexual harassment?

To this, the court responded, again over Ms. Rothenbusch's objection:

> Acts of personal animosity, in and of themselves, are not sexual harassment. The harassment must be because of sex. Please review the entire charge, including page 18.

Shortly thereafter, the jury returned a verdict for Defendant on the state law claims, finding that no sexual harassment had occurred. The court followed suit on the Title VII claims and dismissed the case.

TEXT: REASONS FOR GRANTING THE WRIT

I. IS A HOSTILE ENVIRONMENT HARASSMENT PLAINTIFF REQUIRED TO PROVE THE DISCRIMINATORY INTENT OF A CO-WORKER HARASSER?

A. There is a direct conflict among the Circuit Courts of Appeals on the question of whether a Title VII hostile environment harassment plaintiff must prove an intent to discriminate.

Any harassment in the workplace that discriminates on the basis of a protected characteristic may violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. (1988), if it creates a hostile or abusive environment. Patterson v. McClean Credit Union, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). As potential violations of Title VII, all harassment claims, whether, racial, religious, sexual, or based on national origin are subject to the same analysis. Boutros v. Canton Regional Transit Auth., 997 F.2d 369 (6th Cir. 1993) (holding that elements of racial, sexual and national origin harassment are the same).

In its first decision on hostile environment harassment, this Court ruled that hostile environment sexual harassment, when "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," Meritor Savings Bank v. Vinson, 477 U.S. 57, 67, 106 S. Ct. 2399, 2405, 91 L.Ed. 2d 49 (1986) (internal quotation marks and citation omitted), is a violation of Title VII.

In 1993, this Court reaffirmed that standard and

provided further guidance to the courts for determining the severity and pervasiveness required before Title VII is violated. Harris v. Forklift Sys., Inc., ___ U.S. ___, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993). In Harris, this Court held that a hostile environment sexual harassment plaintiff need not prove psychological injury in order to prevail.

Neither of these cases, however, clearly stated whether a hostile environment sexual harassment plaintiff must prove that the harasser intended to discriminate on the basis of sex in order to establish a violation of Title VII. As a result, the Circuit Courts of Appeals have split on this issue.

Two Circuits, the Third and Fourth have clearly concluded that hostile environment sexual harassment plaintiffs, in order to demonstrate a Title VII violation, must establish the discriminatory intent of the harasser. Bouton v. BMW of N. Am., 29 F.3d 103 (3d Cir. 1994); Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983).

Two more Circuits, the Sixth and the District of Columbia, have implied that intent is a required element of a hostile environment sexual harassment claim by requiring the plaintiff to demonstrate that she would not have been the object of harassment but for her sex. Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041, 107 S.Ct. 1983, 95 L.Ed.2d 823 (1987); McKinney v. Dole, 765 F.2d 1129 (D.C. Cir. 1985).

In contrast, five Circuits, the Second, Seventh, Eighth, Ninth, and Tenth, have concluded that discriminatory intent is not a required element of a hostile environment

sexual harassment claim. Carrero v. New York City Hous. Auth., 890 F.2d 569 (2d Cir. 1989); Hutchison v. Amateur Elec. Supply, 42 F.3d 1037 (7th Cir. 1994); King v. Board of Regents of the Univ. of Wis. Sys., 898 F.2d 533 (7th Cir. 1990); Trautvetter v. Quick, 916 F.2d 1140 (7th Cir. 1990); Kopp v. Samaritan Health Sys., 13 F.3d 264 (8th Cir. 1993); Fuller v. City of Oakland, 47 F.3d 1522 (9th Cir. 1995); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987). See also Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668 (7th Cir. 1993) (use of term "nigger" by supervisor created hostile environment because of its impact); Antonio v. Wards Cove Packing Co., 10 F.3d 738 (9th Cir. 1993) (remanding with instructions to determine whether race labelling created a discriminatory impact, thus creating a hostile environment) (citing Harris, ___ U.S. at ___, 114 S.Ct. at 370).

Moreover, two Circuits, the Fifth and the Eleventh have decided harassment cases both ways. Compare Jones v. Flagship Int'l, 793 F.2d 714 (5th Cir. 1986), cert. denied, 479 U.S. 1065, 107 S.Ct. 952, 93 L.Ed.2d 1001 (1987) (intent required) with Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972) (intent not required); compare also Huddleston v. Roger Dean Chevrolet, 845 F.2d 900 (11th Cir. 1988) (intent required) and Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (intent required) with Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311 (11th Cir. 1989) (intent not required) and Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486 (M.D. Fla. 1991) (intent not required).

This Court should grant certiorari to resolve the

confusion among the Circuit Courts of Appeals with regard to whether discriminatory intent is a necessary element of a hostile environment harassment claim.

B. The decisions below raise important questions regarding the standard of proof required in a hostile environment harassment case

This Court, in Meritor Savings Bank v. Vinson, 477 U.S. 57, 67, 106 S. Ct. 2399, 2405, 91 L.Ed. 2d 49 (1986), held that hostile environment sexual harassment is actionable under Title VII, but did not provide further guidance on the elements of such a claim. Recently, in Harris v. Forklift Sys. Inc., ___ U.S. ___, 114 S. Ct. 367, 126 L.Ed. 2d 295 (1993), this Court did elucidate the requirements of one of the elements of a hostile environment sexual harassment claim by holding that the conduct need not "seriously affect plaintiff's psychological well-being" before it violates Title VII.

In these two cases, this Court did not address how to interpret Title VII's "because of race, color, religion, sex, or national origin" requirement in the context of a hostile environment harassment claim. Neither case focused on the motive for the harassment. However, each of these cases did imply that the focus in a hostile environment case should be the effect of the conduct on the victim, not the intent of the harasser. Meritor Savings Bank, 477 U.S. at 66-67, 106 S.Ct. at 2405 ("'Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.'") (quoting Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982)); Harris, ___ U.S. at ___, 114 S.Ct. at 371 ("the very fact that

the discriminatory conduct was so severe or abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality").

Moreover, both cases cited with approval the EEOC Guidelines, codified at 29 C.F.R. §1604.11. Harris, ___ U.S. at ___, 114 S.Ct. at 371; Meritor Savings Bank, 477 U.S. at 65, 106 S.Ct. at 2404-05. The EEOC Guidelines define sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature [which] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. §1604.11(a) (1994) (emphasis added).

Several of the Circuit Courts of Appeals have incorporated this language ("conduct which has the purpose or effect") into their definitions of hostile environment sexual harassment. Carrero v. New York City Hous. Auth., 890 F.2d 569 (2d Cir. 1989); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311 (11th Cir. 1989). In fact, the Ellison court explicitly stated that the focus should be on the victim's perspective and not on the harasser's motivation for the conduct. Ellison, 924 F.2d at 880 ("We note that the reasonable victim standard we adopt today classifies conduct as unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment.") (citing Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972) and Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)). The

Rogers court, also citing Griggs, similarly held that the lack of a finding of discriminatory intent is irrelevant to a Title VII hostile environment claim. Rogers, 454 F.2d at 239 ("the thrust of Title VII's proscriptions is aimed at the consequences or effects of an employment practice and not at the employer's motivation").

In contrast, other Circuit Courts of Appeals have focused instead on the motivation of the harasser. In Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986), cert. denied, 481 U.S. 1041, 107 S.Ct. 1983, 95 L.Ed.2d 823 (1987), the Sixth Circuit held that a hostile environment sexual harassment plaintiff "must demonstrate that she would not have been the object of harassment but for her sex." The court expounded on this requirement by stating that sexual conduct that was equally offensive to both men and women would not by definition violate Title VII. Id. The McKinney court used similar "but for" language in describing the "because of . . . sex" requirement, explaining that the harassment must be "caused by the sex of the harassed employee." McKinney v. Dole, 765 F.2d 1129 (D.C. Cir. 1985) (emphasis added).

The Third Circuit Court of Appeals has been quite explicit in requiring a showing of discriminatory intent. In fact, the Andrews court held that the first element that a plaintiff must prove in her hostile environment sexual harassment claim that she suffered intentional discrimination because of her sex. Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990) (citing Rabidue, 805 F.2d at 619-20).

If a hostile environment plaintiff is required to prove the discriminatory intent of the harasser in order to prevail,

a formidable defense becomes available to employers. All that would be required to escape liability for sexual harassment is to present evidence of some other lawful (though not necessarily socially acceptable) motivation for the harasser's conduct, such as personal animosity, revenge, or lust. Thus, even if the harasser chooses sexually explicit methods of communicating his dislike of a woman or group of women, as long as his motive is based on personal factors and not a desire to discriminate against women in general, he can continue to harass with impunity. This is exactly how Ford successfully defended this case at trial, including its proposed "personal animosity" jury instruction adopted by the trial court.

The "personal animosity" defense would be particularly effective in cases where the harasser and the victim have ended an intimate relationship, as in the present case. The Sixth Circuit displayed its attitude toward this problem in the opening sentence of its opinion. Rothenbusch v. Ford Motor Co., No. 93-3945 at 1 (6th Cir. Jul. 20, 1995) ("This case appears to be the classic story of workplace romance turned sour."). This defense would provide immunity to an ex-spouse or ex-lover to say or do whatever he wanted, regardless of its effect on his victim, or others in the workplace, because the failed relationship will always provide the required "personal factors" that motivated the conduct. Allowing such a defense would help perpetuate the harmful stereotype that women involved in messy breakups are somehow to blame for the animosity, and that they therefore deserve any sexually humiliating, demeaning, and intimidating conduct directed at them by the ones they "harmed." More ominously, such a defense may provide immunity to the employee who brings domestic violence into the workplace, endangering not only his or her spouse, but

other co-workers as well.

The "personal animosity" defense also ignores the impact that sexually derogatory comments may have on others in the workplace. In this case, Meyer targeted sexually humiliating and demeaning comments directly at Ms. Rothenbusch, but he did so in a public way. Other women in the Ford plant may have also been offended by Meyer's posters, but if any of them had filed a sexual harassment charge, Ford would be able to invoke the "personal animosity" defense and be immune from liability for the posters' effects on anyone in the workplace.

The problem becomes even clearer when the "personal animosity" defense is applied to racial or religious hostile environment cases. Suppose an employee uses a racial epithet and images of a noose, a burning cross, and a Ku Klux Klan hood posted throughout the workplace to express his dislike for a fellow employee who is African-American. Or suppose that another employee expresses his dislike for a fellow Jewish employee by making constant jokes and references to the Holocaust, saying repeatedly that "Hitler never finished the job." As long as these harassers can establish that they really did dislike these particular co-workers for some personal reason, and harbored no racial or religious animus toward any other African-American or Jewish co-workers, their employer need do nothing to stop the harassment.

Yet, no one could dispute the effect these particular forms of harassment would have on both the targeted employees and all other African-American or Jewish employees who observed the harassment. Because "Title VII affords employees the right to work in an environment free

from discriminatory intimidation, ridicule, and insult," Meritor Savings Bank v. Vinson, 477 U.S. 57, 65, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986), this type of conduct should be just as unlawful as if it was motivated by racial or religious animus. There is no principled reason to treat sexual harassment claims any differently.

Another equally effective defense created by requiring proof of discriminatory motive would be to establish that the harasser directed his hostility at both men and women in the workplace, thereby not differentiating on the basis of sex. This so-called "equal opportunity" harassment, however, is not equal in its impact on men and women when the conduct takes a sexually explicit form. See B. Glenn George, The Back Door: Legitimizing Sexual Harassment Claims, 73 B.U. L. Rev. 1, 31-32 (1993).

Both these defenses, if allowed, would frustrate the purpose of Title VII and ignore the reality of the great impact that sexually derogatory comments, posters, and other sexually explicit conduct have on women, an effect usually not felt by men. Vulgar and offensive sexual epithets are "intensely degrading, deriving their power to wound not only from their meaning but also from 'the disgust and violence they express phonetically.'" Katz v. Dole, 709 F.2d 251 (4th Cir. 1983) (citation omitted). Such conduct serves as a constant reminder that women are neither wanted nor valued in the workplace, and perpetuates the stereotype that women are mere sexual beings and unworthy of respect for their intelligence, education, knowledge or professional experience. The "arbitrary barrier to sexual equality in the workplace" that the Meritor Savings Bank Court spoke of would never be eradicated. Meritor Savings Bank, 477 U.S. at 67, 106 S.Ct. at 2405 (citations omitted).

The Petitioner invites this Court to consider the holdings of the courts below and determine whether Title VII requires a hostile environment harassment plaintiff to demonstrate the discriminatory motive of the harasser.

II. IN A HOSTILE ENVIRONMENT HARASSMENT CLAIM, MAY THE DISCRIMINATORY INTENT OF THE HARASSER BE PROVEN USING A MIXED-MOTIVES ANALYSIS?

A. There is a direct conflict among the Circuit Courts of Appeals on the question of whether a Title VII hostile environment harassment plaintiff may prove an intent to discriminate using a mixed motives analysis.

This Court ruled that an employer will violate Title VII if it takes any action motivated by both permissible and impermissible factors, unless the employer proves that it would have taken the same action absent consideration of the impermissible factor. Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). Congress expressly adopted this concept in the Civil Rights Act of 1991, although it changed the liability that attaches if any discriminatory intent is proven. Civil Rights Act of 1991, Pub. L. No. 102-166, §107, 105 Stat. 1071 (1991) (codified at 42 U.S.C. §2000e-2(m)).

Neither the Price Waterhouse Court nor Congress expressly limited the application of a mixed motives analysis to certain kinds of Title VII cases. Nevertheless, some Circuit Courts of Appeals have hesitated, or even refused, to allow application of a mixed motives analysis to sexual

harassment cases.

The Eighth Circuit held that a mixed motives analysis is inapplicable to a hostile environment sexual harassment claim. Stacks v. Southwestern Bell Yellow Pages, 27 F.3d 1316 (8th Cir. 1994). The Seventh Circuit reached the same result, although not by explicitly rejecting a mixed motives analysis. Trautvetter v. Quick, 916 F.2d 1140 (7th Cir. 1990); Huebschen v. Department of Health and Social Serv., 716 F.2d 1167 (7th Cir. 1983). In these cases, the Seventh Circuit concluded that the plaintiff must demonstrate that the harasser's conduct was motivated because of the victim's gender, and not because of personal characteristics. Trautvetter, 916 F.2d at 1151; Huebschen, 716 F.2d at 1171-72. Relying on this analysis, a fact finder would be forced to choose which motive, assuming more than one is present, is predominant.

The Sixth Circuit, in the present case, ruled that a jury instruction which, in effect, forced the jury to choose between two motives was proper. Rothenbusch v. Ford Motor Co., No. 93-3945 (6th Cir. 1995) (citing Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986), cert. denied, 481 U.S. 1041, 107 S.Ct. 1983, 95 L.Ed.2d 823 (1987)). Ms. Rothenbusch had presented evidence that Meyer was motivated by both his personal animosity for her and because of her gender. Id. at 2-3. However, the jury instruction in question did not allow the jury to consider that both motives could have been substantial factors in Meyer's decision to behave as he did.

In contrast, the District of Columbia and the Third Circuit Courts of Appeals have allowed a sexual harassment plaintiff to prevail as long as sex was a substantial factor

motivating the conduct. See Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Spain v. Gallegos, 26 F.3d 439 (3d Cir. 1994); Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990). In addition, the Ninth Circuit acknowledged that a sexual harasser may have mixed motives. EEOC v. Farmer Bros. Co., 31 F.3d 891 (9th Cir. 1994).

This Court should grant certiorari to resolve the confusion among the Circuit Courts of Appeals with regard to whether discriminatory intent in a hostile environment harassment claim may be proven by a mixed motives analysis.

B. The decisions below raise important questions regarding the standard of proof required in a hostile environment harassment case

This Court recognized that the phrase "because of . . . sex" does not mean "solely because of . . . sex." Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (citing 110 Cong. Rec. 2728, 13837 (1964), which reflected that Congress had rejected an amendment to the Civil Rights Act of 1964 that would have inserted the word "solely" in front of "because of"). The Price Waterhouse plurality continued that "Title VII [was] meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations." Id. at 241.

There is no logical reason why a sexual harassment plaintiff must prove that her gender was the one and only reason for her tormentor's conduct, while every other Title VII plaintiff can prevail as long as he or she proves that among the many considerations motivating the adverse action, his or her race, sex, religion or national origin was

at least one of them.

The Eighth Circuit Court of Appeals' specific objection to applying a Price Waterhouse analysis to a hostile environment sexual harassment claim reflects an apparent misunderstanding of Price Waterhouse. Stacks v. Southwestern Bell Yellow Pages, 27 F.3d 1316 (8th Cir. 1994). The Stacks court rejected a mixed motive analysis because the court wrongly believed that it was designed for cases that challenge an adverse employment action motivated by both legitimate and illegitimate considerations. Id. at 1326 (citing Price Waterhouse, 490 U.S. at 247) ("An employer could never have a legitimate reason for creating a hostile environment.").

This statement misconstrues the term "legitimate." A hostile environment may be created by conduct motivated by personal animosity, or any number of other reasons that do not violate Title VII. Although such reasons may not constitute a legitimate business reason, as that term has been used in Title VII jurisprudence, they are at least legitimate in that they do not violate Title VII.

In a previous case, the Eighth Circuit also failed to apply a mixed motives analysis, although without explicitly stating that such an analysis was inappropriate. Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959 (8th Cir. 1993). Instead, the court chose one of two motives that were obviously determining factors in the harasser's behavior. Id. at 965. In Burns, the harasser and the victim disliked each other, but the harasser chose to express his dislike for the plaintiff with "obscene name-calling." Id. at 964-65. Unlike the jury in the present case, the Eighth Circuit decided that the conduct was based on sex, not personal animosity. Id.

at 965.

Recognizing the application of mixed motives analysis to hostile environment sexual harassment claims is important for two reasons. First, in cases such as the present one that include allegations of motivation other than gender, a plaintiff can prevail despite that other motivation as long as she can prove that her gender was also a motivating factor. Without a mixed motives analysis, fact-finders will be forced to choose between the motivating factors, resulting in widespread inconsistencies. Compare Burns, 989 F.2d at 965 with Rothenbusch, No. 93-3945 at 6-7. Moreover, the inapplicability of a mixed motives analysis to hostile environment claims will provide harassers a good defense that will allow them to continue their harassing behavior with impunity as long as they also continue to dislike their victims.

Second, many plaintiffs' sexual harassment claims consist of conduct that is not overtly sexual. Such plaintiffs' burden of proof is especially heavy, see Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990), but will be impossible where there is evidence that personal factors motivated the conduct, unless the fact finder is allowed to consider all the motives behind the conduct. Plaintiffs bringing these kinds of claims should not automatically be denied a remedy.

The Petitioner invites this Court to consider the holdings of the courts below and determine whether a mixed motives analysis is applicable to hostile environment harassment claims.

III. IN DETERMINING WHETHER TWO EMPLOYEES ARE SIMILARLY SITUATED FOR PURPOSES OF DISPARATE TREATMENT ANALYSIS, MUST THE TWO EMPLOYEES BE SIMILARLY SITUATED IN ALL RESPECTS, OR MERELY IN ALL RELEVANT RESPECTS?

A. The decisions below raise important questions regarding the standard of proof required in a disparate treatment case

The Sixth Circuit has articulated two tests for comparing employees in a disparate treatment case. Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992) (to be compared, employees must be "similarly situated in all respects") (emphasis in original); Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796 (6th Cir. 1994) ("plaintiff must prove that all of the relevant aspects of his employment situation are 'nearly identical'" to those of the employees with whom he wished to be compared). While the two tests do not appear to differ greatly, they differ dramatically in application.

In the present case, the District Court instructed the jury to use the Mitchell test over Ms. Rothenbusch's objection that the language was too restrictive, and the court itself applied the Mitchell test. Rothenbusch v. Ford Motor Co., No. C-1-91-860 at 11 (S.D. Ohio, 1993), aff'd by Rothenbusch v. Ford Motor Co., No. 93-3945. The Sixth Circuit also relied on Mitchell, disregarding the Pierce case which had been decided eight months earlier. Rothenbusch, No. 93-3945 at 9. Relying on Mitchell, the district court excluded evidence of a comparable male employee who had also committed an assault, but was not terminated. The Sixth

Circuit affirmed this exclusion, deciding that the "incident was not similar in all respects because [he] was an engineer and not a supervisor, and his assault occurred 'after plaintiff's attack upon her ex-husband and after the decision to discharge her was made.'" Rothenbusch, No. 93-3945 at 12 (emphasis in original).

Under a Pierce analysis, neither the job title nor the time frame of the assault would be relevant in determining whether the severity of the infractions were substantially similar so as to offer a proper comparison of the treatment of the two employees. If the Sixth Circuit had relied on the Pierce test, it would not have affirmed the exclusion of this evidence, and a different result might have been obtained.

Ms. Rothenbusch also presented testimonial evidence that Ford considered both sexual harassment and assault serious offenses, recognizing by its nature that sexual harassment is an assault. Both of these types of misconduct could result in termination of the employee so charged. However, while Ms. Rothenbusch was fired for her alleged assault, Meyer was only given a minimal reprimand for his acts of sexual harassment. Because the jury instruction regarding similarly situated employees was based on the Mitchell test, the jury apparently decided that Ms. Rothenbusch's assault and Meyer's sexual harassment were not similar "in all respects," and found Ms. Rothenbusch was not the victim of disparate treatment.

Neither court below commented on this evidence. Pierce, however, makes clear that the two employees to be compared need not be identical in all respects, but merely "nearly identical" in all relevant respects. Pierce, 40 F.3d at 602 (emphasis added). A jury instruction that made this

distinction clear might have resulted in a di..erent verdict.

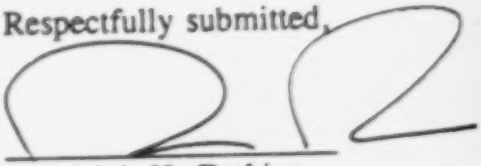
Clarification of the standard for determining when employees are similarly situated is needed. Most disparate treatment plaintiffs cannot prove that their employment situations were exactly like any other employees' situations. The conduct itself, as well as mitigating and aggravating factors, will always differ in some respect. Lower courts require guidance on how much these employment situations may differ before finding that the compared employees are not similarly situated.

The Petitioner invites this Court to consider the holdings of the courts below and determine the appropriate standard for determining when employees are similarly situated for purposes of disparate treatment analysis.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,



Randolph H. Freking
FREKING & BETZ
225 East Sixth Street
Second Floor
Cincinnati, Ohio 45202
(513) 721-1975
Counsel for Petitioner

APPENDIX

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NOT RECOMMENDED FOR PUBLICATION

No. 93-3945

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROSE ANN ROTHENBUSCH,	)	
	)	
Plaintiff-Appellant,	)	ON APPEAL FROM
	)	THE UNITED
v.	)	STATES DISTRICT
	)	COURT FOR THE
FORD MOTOR COMPANY,	)	SOUTHERN
	)	DISTRICT OF OHIO
Defendant-Appellee.	)	

Before: **GUY**, **BOGGS**, and **SILER**, Circuit Judges.

PER CURIAM. Plaintiff Rose Ann Rothenbusch brought this action against defendant Ford Motor Company alleging sexual harassment, sexual discrimination, and retaliation in her discharge from employment, in violation of Title VII and Ohio law. A jury returned a verdict for Ford on the state law charges, and the court dismissed the federal law charges. The court subsequently denied Rothenbusch's motion for a new trial on the state law claims. Based on the following discussion, we affirm.

I.

A. Factual History

This case appears to be the classic story of workplace romance turned sour. Rothenbusch worked her way up from a clerical worker for Ford Motor Company in 1973 to a line supervisor for Ford's transmission plant in Batavia, Ohio -- a position she held until being discharged in 1991. She met Fred Meyer, another supervisor at Ford, and eventually married him in 1983. In July 1990, they separated and filed a petition for divorce. A series of difficulties erupted and each had the other arrested on more than one occasion. At work, Meyer began to make degrading remarks to her, such as "whore" and "slut," and, at times, followed her as she attended to her duties.[1]

Rothenbusch informed a Ford supervisor, James W. Brown. When Brown and Meyer's supervisor interviewed Meyer, he denied all accusations. Brown also interviewed a possible witness, who failed to identify any wrongdoing by Meyer. Brown warned Meyer to keep his personal business out of the plant and to stay away from Rothenbusch on Ford property.

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[1]Meyer also presented testimony that Rothenbusch called Meyer a "bastard" and a "son of a bitch," and told a co-worker that Meyer was impotent. Meyer also complained that two derogatory posters referring to him were hung up in the plant.

Beginning in September 1990 and continuing through the fall, copies of posters and adulterated greeting cards began appearing in the plant. These materials contained sexual innuendos, partial nudity, and insults aimed at Rothenbusch. At least one poster contained a graphic illustration of a sexual act along with Rothenbusch's married name, Rose A. Meyer. Plaintiff believed that Meyer was responsible for displaying these materials, and informed Brown about the posters on several occasions. She did not, however, give any of the materials to Brown.

Brown interviewed Meyer several times about the allegations, but repeatedly received only statements of denial. Brown again told Meyer to keep his personal business out of the plant. With no other witnesses or leads, Brown did not investigate further.

On September 27, 1990, Rothenbusch and Meyer had a heated exchange in the plant cafeteria. Brown told them both to keep their personal problems out of the plant. During this time period, Rothenbusch began psychological counseling for emotional difficulties resulting from problems outside of work.

In October 1990, Rothenbusch observed more insulting posters, and reported this to Evan Slater, an employee relations representative. Ford discovered several posters and promptly removed them. Again, Meyer denied responsibility, and, again, Brown told both Meyer and Rothenbusch to keep their personal problems out of the plant.

On November 2, 1990, Rothenbusch took a voluntary medical leave from her position at Ford because of stress and emotional difficulties. She continued to receive psychiatric counseling during her leave, and returned to work on January 7, 1991.

In early April 1991, Rothenbusch and her supervisor Carol Porter got into an argument. She was subsequently transferred from the second shift to the third shift. On May 16, 1991, she wrote a letter to Brown explaining why she felt compelled to file a charge of sexual harassment. On May 17, 1991, she filed charges of sexual harassment with the Equal Employment Opportunity Commission (EEOC) and the Ohio Civil Rights Commission (OCRC).

On May 19, 1991, Porter called Rothenbusch into work. In the course of her duties, Rothenbusch used a scooter to drive around the plant. The scooter had grease on the driver's seat. She then realized that she had grease on her pants and got upset, believing that Meyer was responsible for the grease -- although he would have had a difficult time knowing which particular scooter she would use on that day. Later that day, Rothenbusch came upon Meyer while she was driving her scooter, and sprayed him in the face with mace or a mace-like chemical.

Meyer reported the incident to plant security, who then interviewed Rothenbusch. She denied that she had sprayed any chemical substance in Meyer's face. Brown investigated the incident, and confirmed through eyewitnesses

that Rothenbusch had sprayed Meyer.[2] Ford suspended Rothenbusch with pay pending the outcome of the investigation.

Ford received a copy of the EEOC charge on May 20, 1991. On May 21, Brown met with Rothenbusch to discuss her sexual harassment allegations, and she, for the first time, provided the name of a witness who had observed Meyer hanging offensive posters. Through an interview with the witness on May 26, Brown learned that the witness had seen Meyer hang posters on two occasions.

On May 30, 1991, Brown sought approval from Ford's divisional employee relations office in Detroit to fire Rothenbusch based on her assault on Meyer, which Brown concluded, was an unprovoked, premeditated attack with an unauthorized substance.[3] Rothenbusch was then discharged.

In the fall of 1991, Ford determined that Meyer had violated its policy against sexual harassment due to his probable involvement in hanging two posters in the plant in the fall of 1990, and issued a written letter of reprimand to him.

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[2]Rothenbusch admitted in her deposition and at the trial that she had sprayed Meyer.

[3]Brown also included information about the history of Rothenbusch and Meyer's marital conflicts, her allegations against Meyer, Meyer's repeated denials, plaintiff's medical leave, and plaintiff's filing charges with the EEOC and the OCRC on May 16, 1991.

B. Procedural History

Rothenbusch brought this action against Ford under Title VII, parallel provisions of Ohio law, and a theory of intentional infliction of emotional distress.[4] From February 3, 1993, to February 16, 1993, the plaintiff's state law claims were tried before a jury, and her Title VII claims were tried before the district court. At the close of the plaintiff's case, the court dismissed Rothenbusch's claim of intentional infliction of emotional distress. The jury returned a verdict for Ford finding no harassment, discrimination, or retaliation under Ohio law. The court made a similar finding and dismissed the Title VII claims. Rothenbusch then moved for a new trial on the state law claims, and the court denied the motion. She appeals based on alleged errors regarding sufficiency of evidence, jury instructions, jury confusion, and exclusion of evidence.

II.

Rothenbusch argues that the trial court erred in its jury instruction on harassment by stating that harassment must be based on sex, and not merely personal animosity. We review jury instructions to ensure that "the instructions show no tendency to confuse or mislead the jury with respect to the applicable principles of law." Clarksville-Montgomery County School Sys. v. United States Gypsum Co., 925 F.2d 993, 1003 (6th Cir. 1991) (citation omitted).

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[4]She also brought claims for age discrimination and negligent infliction of emotional distress, but later dropped them voluntarily.

The jury instruction in question was stated as follows:

> To show that the alleged harassment was based on sex, Plaintiff must prove by a preponderance of the legal evidence that but for the fact of her sex, she would not have been the object of unlawful harassment. Harassment is prohibited by Ohio law only if it is based on being male or female. Personal animosity is not the equivalent of sexual harassment and is not proscribed by law.

The jury requested clarification of the instruction: "Does the word "equivalent" infer that personal animosity does not carry as much weight as sexual harassment, or does equivalent mean that acts of personal animosity cannot be construed as sexual harassment?" The court responded by stating that "[a]cts of personal animosity, in an of themselves, are not sexual harassment. The harassment must be because of sex. Please review the entire charge . . ."[5]

The four elements of a hostile environment claim are that:

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[5]At the charge conference, Rothenbusch's counsel seemed to agree with the "personal animosity" aspect of the charge. He stated: "I don't have any problem with the statement that 'personal animosity is not the equivalent of sexual harassment as proscribed by law,' in that general concept. What I have a problem with is the last phrase of the first sentence, that 'she would not have been the object of harassment but for the fact of her sex.'"

(a) the employee [is] a member of a protected class;

(b) the employee was subjected to unwelcomed sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature;

(c) the harassment complained of was based upon sex; and

(d) the existence of respondeat superior liability.

Rabidue v. Osceola Refining Co., 805 F.2d 611, 619-20 (6th Cir. 1986) (emphasis added), cert. denied, 481 U.S. 1041 (1987).[6] The jury instruction was consistent with this statement of the law and sufficiently clear to avoid confusion. "A jury instruction which states the law with substantial accuracy and fairly submits the issues to the jury will not provide grounds for reversal." Clarksville, 925 F.2d at 1003 (citation omitted). Accordingly, we find no error in the court's instruction and clarification.

III.

Next, Rothenbusch argues that the factual findings regarding her claims of harassment, discrimination, and retaliation were clearly erroneous, and, thus, the trial court

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[6]At the time of trial, the law in this circuit also required a plaintiff to show that the environment "seriously affected [her] well-being." Rabidue, 805 F.2d at 619-20. The Supreme Court rejected that requirement in Harris v. Forklift Sys., 114 S. Ct. 367 (1993) (holding that hostile environment claim does not require concrete psychological injury).

erred by not granting a new trial. We review a denial of a new trial motion under an abuse of discretion standard. United States v. L.E. Cooke Co., 991 F.2d 336, 343 (6th Cir. 1993). A district court abuses its discretion when it relies on clearly erroneous findings of fact. Black Law Enforcement Officers Ass'n v. City of Akron, 824 F.2d 475, 479 (6th Cir. 1987). As the Supreme Court has held, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985).

This court accords substantial deference to jury verdicts. Davis v. Mutual Life Ins. Co., 6 F.3d 367, 374 (6th Cir. 1993), cert. denied, 114 S. Ct. 1298 (1994). "We may neither weigh the evidence, pass on the credibility of the witnesses, not substitute our judgment for that of the jury." Id. We must view the evidence in the light most favorable to Ford, drawing all reasonable inferences in its favor. Id.

A. Harassment

Rothenbusch argues that the factual findings regarding sexual harassment were clearly erroneous. The court will only reverse the decision below if each of these findings is clearly erroneous. First, Rothenbusch contends that Ford failed to respond adequately and effectively when it had notice of the sexual harassment. The district court addressed this argument in its order denying Rothenbusch's motion for a new trial, and found that the jury's conclusions were reasonable in light of the inconsistencies in Rothenbusch's testimony, as well as the testimony of the defense witnesses which tended to discredit her story. For example, Brown

testified that he investigated every complaint brought to him by Rothenbusch. He also testified that she did not provide corroborating information about the harassment until after the investigation began concerning her assault on Meyer.

A review of the record shows that the finding of Ford's adequate and prompt response was not clearly erroneous. The district court did not abuse its discretion in denying the motion for a new trial. Because Rothenbusch has failed to show clear error on this issue, there is no reason to address her remaining allegations of clearly erroneous factual findings on the harassment claim.[7]

B. Sex Discrimination

Rothenbusch contends that the district court should have granted her motion for a new trial because the factual findings regarding her discrimination claim were clearly erroneous.

At trial, she contended that she was treated differently than other salaried employees who had committed assaults. The jury found no discriminatory treatment and concluded that Ford "proved by a preponderance of the legal evidence that it would have made the same decision to terminate plaintiff even if it had not considered her sex." Denying the motion for a new trial, the district court concluded that the

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[7]Additionally, she asserts that all of the harassment findings were tainted by the jury instruction regarding "personal animosity" as discussed in the previous section. There was no error in the jury instruction, and thus, this assertion is without merit.

jury verdict was "reasonable since the trial record contained evidence that Plaintiff was discharged -- not because of her sex -- but because she sprayed a mace-like substance at her ex-husband on July 19, 1991."

The district court did not abuse its discretion in denying the motion. Rothenbusch failed to show that the findings below were unsupported by the record. Although Rothenbusch presented evidence that Ford did not discharge some male employees who engaged in workplace assaults, she failed to show that these employees were "similarly-situated **in all respects.**" Mitchell v. Toledo Hosp., 964 F.2d 577, 584 (6th Cir. 1992) (emphasis in original). For example, Ford did not fire two male employees who committed assaults involving provocation and heat-of-the-moment passion. In Rothenbusch's case, however, Ford fired her for committing a premeditated assault. The factual findings regarding the discrimination claim were not clearly erroneous.[8]

C. Retaliation

Rothenbusch also contends that the factual findings pertaining to her retaliation claim were clearly erroneous. She argued at trial that Ford discharged her in retaliation for her filing a discrimination charge with the EEOC and the OCRC. In support, she cited the fact that she was fired only

[8]Ford argues that the district did not have jurisdiction over the sex discrimination claim. We have no reason to address this argument because we affirm the decision below in favor of Ford.

a few days after filing her charge. Additionally, she noted that the report of her filing was made known to the employment authorities in Ford's Detroit office.

The record supports the factual findings on the retaliation claim. Rothenbusch assaulted a fellow employee the day before Ford received the EEOC charge. It was reasonable for the jury to conclude that her assault was the impetus for Ford's initiation of a detailed investigation and its ultimate decision to discharge her. Moreover, it is not per se improper for an employer to include a record of an employee's discrimination charges in that employee's file. The district court did not abuse its discretion in denying the motion for a new trial regarding her retaliation claim.

IV.

Next, Rothenbusch argues that the trial court improperly excluded evidence. We will reverse on this ground only if the district court abused its discretion. United States v. Bowling, 900 F.2d 926, 934 (6th Cir.) (citing Martin v. Weaver, 666 F.2d 1013, 1020 (6th Cir. 1981), cert. denied, 456 U.S. 962 (1982)), cert. denied, 498 U.S. 837 (1990). An abuse of discretion is defined as "a definite and firm conviction that the trial court committed a clear error of judgment." Monette v. AM-7-7 Baking Co., 929 F.2d 276, 280 (6th Cir. 1991).

First, Rothenbusch argues that the court erroneously excluded a document from the files of the Ohio Civil Rights Commission which showed that Ford considered assault and sexual harassment to be offenses of comparable seriousness.

The district court excluded the document because it was information given to the OCRC in the context of settling a dispute.

Courts have upheld the exclusion of such investigatory files which, as one court characterized, often represent a "'mish-mash of self-serving and hearsay statements and records. . . .'" Tulloss v. Near North Montessori School, 776 F.2d 150, 154 (7th Cir. 1985) (quoting Gillan v. Federal Paper Board Co., 479 F.2d 97, 99 (2d Cir. 1973)). Accordingly, the district court did not abuse its discretion in excluding this document.

Rothenbusch also sought to introduce evidence concerning an assault in 1992 committed by a male employee, Vaughn Stinson, who was not discharged. Stinson had assaulted a Japanese contractor who was working at the Ford plant. The court excluded the evidence based on its finding that the evidence was highly prejudicial and only marginally relevant. Additionally, the court noted that the record already contained evidence of Ford's treatment of assaults involving male employees.

The district court denied Rothenbusch's motion for a new trial on this point. Specifically, the court found that the incident was not similar in all respects because Stinson was an engineer and not a supervisor, and his assault occurred "after plaintiff's attack upon her ex-husband and after the decision to discharge her was made."

In Mitchell v. Toledo Hosp., we set forth a rigorous test for showing that two employees are "similarly-situated":

> [T]o be deemed "similarly-situated", the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

964 F.2d at 583 (citations omitted). The court did not abuse its discretion in holding that Rothenbusch and Stinson were not similarly situated. Rothenbusch's assault was premeditated, while Stinson's was in the heat of the moment; Rothenbusch used a chemical weapon, while Stinson used his hand; and Rothenbusch was a supervisor, while Stinson was an engineer. Additionally, the court had already permitted evidence of other assaults.

V.

Using special verdicts, the jury found that Rothenbusch failed to prove any of the elements of a hostile environment claim. It also found that she failed to prove any damages proximately caused by Ford's termination of her employment. Rothenbusch argues that jury's answers on these questions were unsupported by the evidence, and, thus, represent jury confusion.

The district court did not abuse its discretion in denying the motion for a new trial regarding these alleged errors. Even if Rothenbusch could show confusion or inconsistency regarding one or two of the twenty-one special verdicts, the overall verdict was clear and supported by the record as a whole. See Waggoner v. Mosti, 792 F.2d 595, 596-97 (6th Cir. 1986) ("it is incumbent upon a trial court, as well as an appellate court, 'to reconcile the answers if possible under any view of the evidence'").

AFFIRMED.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROSE ANN ROTHENBUSCH,

Plaintiff

v. C-1-91-860

FORD MOTOR COMPANY,

Defendant

ORDER

Plaintiff Rose Ann Rothenbusch brings this action against her former employer, defendant Ford Motor Company, under Title VII of the Federal Civil Rights Acts of 1964 (Title VII), as amended by the Federal Civil Rights Act of 1991, 42 U.S.C. §§ 2000e-2, 2000e-3; under parallel provisions of Ohio law, Ohio Rev. Code § 4112.02(A); and under a theory of intentional infliction of emotional distress.

From February 3, 1993 to February 16, 1993, a jury trial was held on plaintiff's state law claims while plaintiff's equitable Title VII claims were tried to the Court. At the

close of plaintiff's case, the Court granted, in part, Ford's motion for judgment as a matter of law dismissing plaintiff's claim of intentional infliction of emotional distress. The jury determined that plaintiff's remaining Ohio claims lack merit (doc. no. 82), and Ford's response (doc. no. 84).

This matter is before the Court for resolution of plaintiff's Title VII claims. The parties have submitted proposed findings of fact and conclusions of law (doc. nos. 50, 56). This matter is also before the Court upon plaintiff's motion to stay Title VII decision (doc. no. 84), and Ford's response (doc. no. 85).

FINDINGS OF FACT

(1) Ford hired plaintiff in 1973 as a clerical worker at its plant in Fairfax, Ohio. Plaintiff worked hard and obtained promotions to better paying positions on several occasions. In December 1976 she earned her first position as a supervisor. In 1981 plaintiff began working as a supervisor at Ford's transmission plant in Batavia, Ohio. She held various "first-line" supervisor positions at the Batavia plant throughout the 1980s. Plaintiff's work-performance evaluations were satisfactory or better throughout the 1980s.

(2) In July 1990 plaintiff and her then husband Fred Meyer, also a supervisor at the Batavia plant, filed a petition for dissolution of their marriage. A series of difficulties soon erupted between plaintiff and Meyer. Meyer began making degrading and vulgar remarks to plaintiff. Each had the other arrested on several occasions.

(3) Meyer began to make degrading remarks to plaintiff while they were at work. He called plaintiff, among other things, a "whore" and a "slut". Meyer never passed up an opportunity to insult plaintiff. Upon occasion Meyer followed plaintiff as she attended to her duties in the plant.

(4) Plaintiff informed James W. Brown, Ford's supervisor of salaried employees. When Brown and Meyer's supervisor interviewed Meyer, he denied any wrongdoing. Brown also interviewed another employee identified by plaintiff as a possible witness. This employee failed to identify any wrongdoing by Meyer. Brown verbally warned Meyer to keep his personal business out of the plant and to keep away from plaintiff on Ford property.

(5) Beginning in September 1990 and continuing through the fall of 1990, posters, adulterated greeting cards, and copies of these materials began appearing in the Batavia plant. Plaintiff received at least one adulterated card in the inter-office mail. The posters and cards contained sexual innuendos, repeated images of a partially nude women, and insults aimed at plaintiff (plaintiff's Exs. 1-1 to 1-14). At least one poster contained a graphic illustration of a sexual act along with plaintiff's then married name, Rose A. Meyer. Id. at Ex. 1-1. Plaintiff believed that Meyer was responsible for displaying these materials.

(6) Plaintiff informed Brown about the posters on several occasions, and she informed Brown that she believed Meyer was responsible for their appearances in the plant. She did not give Brown the posters or copies of the posters.

(7) In response to plaintiff's complaints Brown told her to keep her private business out of the plant. Brown interviewed Meyer several times about the posters and the cards. Meyer denied displaying the posters or sending any cards to plaintiff in the inter-office mail. Brown instructed Meyer to keep his personal business out of the plant. Brown did not investigate the matter further because he believed that given Meyer's repeated denials and given the absence of any witnesses to the hanging of the posters or cards, there was no one left to interview and no other leads to follow.

(8) On September 27, 1990, plaintiff and Meyer exchanged loud words in the plant cafeteria. The next day Brown told them both to keep their personal problems out of the plant.

(9) During September and October 1990 plaintiff obtained psychological counseling. Plaintiff was experiencing emotional difficulties due to problems outside of work. In the past she had been able to resolve her emotional stress by working. Her work performance during this period continued to be better than satisfactory.

(10) In October 1990 plaintiff telephoned Evan Slater, an employee relations representative, to report the presence of derogatory and insulting posters in the plant. Several posters discovered by Ford supervisors were promptly removed. Meyer continued to deny responsibility for these posters. Brown again told both Meyer and plaintiff to keep their personal problems out of the plant.

(11) Beginning on November 2, 1990, plaintiff took a voluntary medical leave from her position at Ford because of the stress and emotional difficulties she was experiencing. Plaintiff received psychiatric counseling during her leave. Plaintiff returned to work on January 7, 1991.

(12) In early April 1991 plaintiff and her supervisor Carol Porter had a heated argument. Following the argument, Porter transferred plaintiff from the second shift to the third shift. The third shift hours required plaintiff to work from approximately 3:30 p.m. to midnight.

(13) On May 16, 1991, plaintiff wrote a letter to Brown explaining why she felt compelled to file a charge of sexual harassment. On May 17, 1991, plaintiff filed charges of sexual harassment with the Equal Employment Opportunities Commission (EEOC) and the Ohio Civil Rights Commission (OCRC).

(14) On Sunday, May 19, 1991, Porter called plaintiff into work due to the absence of another supervisor. Plaintiff used a "scooter" to drive around the plant in performance of her duties. Unbeknownst to plaintiff grease was on the driver's seat of her scooter, and when she sat on the seat her pants became stained. Plaintiff was upset by the incident, but she did not go into a tirade. She believed Meyer was responsible for greasing her scooter, even though he had no way of knowing she would be using that particular scooter on that particular day.

(15) Later in the day plaintiff encountered Meyer in the plant while she was driving her scooter. Without warning she sprayed Meyer's face with mace or a mace-like

chemical. Meyer covered his face with his hands and left the area.

(16) Meyer reported the includent to plant security at 2:52 p.m. (defendant's ex. AA-1). A member of Ford's security staff interviewed plaintiff at 3:07 p.m. Id. at ex. AA-2. Plaintiff then reported the greasing of her scooter. She also stated in writing that Meyer's allegation regarding the macing "is totally false and I feel unfounded." Id.

(17) On Monday, May 20, 1991, Brown asked plaintiff about the incident. She denied spraying Meyer in the face. Eyewitnesses to the incident confirmed that plaintiff had sprayed Meyer in the face with some chemical. Plaintiff was suspended with pay pending the outcome of the investigation into the incident.

(18) Plaintiff admitted at trial that she sprayed Meyer in the face with some type of chemical. She denied this act at the time and continued her denial until her deposition in this case.

(19) Ford received a copy of plaintiff's EEOC charge on May 20, 1991. On May 21, 1991, Brown met with plaintiff to discuss her allegations of sexual harassment and a letter he had received from her. Plaintiff - for the first time - provided Brown with the name of an employee who had witnessed Meyer hanging offensive posters. Brown interviewed the employee on or around May 26, 1991, and learned that she had witnessed Meyer hanging posters on two occasions.

(20) On May 30, 1991, Brown sought approval from Ford's divisional employee relations office in Detroit, Michigan to terminate plaintiff's employment as a result of what Brown concluded was an unprovoked attack by plaintiff upon Meyer. Brown stated, "It must be concluded. . . that Ms. Rothenbusch was in possession of an unauthorized substance on Company property, and used it in a pre-meditated manner to assault Mr. Meyer. In view of this, we feel we have no alternative but to request her 'Release in the Best Interest of the Company'." Id. at AA, p. 4. In his memorandum to Detroit, Brown also included information about the history of plaintiff and Meyer's marital conflicts, her allegations against Meyer, Meyer's repeated denials, plaintiff's medical leave, and the fact that plaintiff had filed charges with the EEOC and the OCRC on May 16, 1991.

(21) Ford's divisional employee relations office in Detroit approved the decision to discharge plaintiff. Plaintiff was discharged effective June 21, 1991.

(22) In September 1991 Ford determined that Meyer had violated its policy against sexual harassment due to his probable involvement in hanging two posters in the Batavia plant in the fall of 1990. On October 1, 1991, Brown issued a written letter of reprimand to Meyer regarding his violations of Ford's policy against sexual harassment.

CONCLUSIONS OF LAW

(1) Plaintiff's claims under the Civil Rights Act of 1991 are not well taken since the events at issue occurred prior to the effective date of the Act, November 21, 1991, and since this Act is not retroactive. Holt v. Michigan Dept. of Corrections, 974 F.2d 771, 772-73 (6th Cir. 1992), petition for cert. filed, Nov. 10, 1992.

(2) In resolving plaintiff's equitable claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(A), this Court may not make findings contrary to or inconsistent with the same issues resolved by the jury as reflected in the jury's verdict. In re: Lewis, 845 F.2d 624, 629-30 (6th Cir. 1988); see also Kitchen v. Chippewa Valley Schools, 825 F.2d 1004 (6th Cir. 1987). "[W]hen a party has a right to a jury trial on an issue involved in a legal claim, the judge is . . . bound by the jury's determination of that issue as it affects his disposition of an accompanying equitable claim." In re: Lewis, 845 F.2d at 629-30 (quoting Kitchen, 825 F.2d at 1014).

Sexual Harassment

(3) Title VII provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . terms, conditions or privileges of employment, because of such individual's . . . sex . . .

42 U.S.C. § 2000e-2(a)(1) (1964).

(4) Guidelines promulgated by the EEOC define sexual harassment as follows:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or (3) such conduct has the purpose of effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a) (1985); see also Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986). Determination of whether conduct constitutes sexual harassment requires consideration of the record as a whole, and the totality of the circumstances, including the alleged nature of the sexual advances and the context in which they occurred. 29 C.F.R. § 1604.11(b); see also Vinson, 477 U.S. at 66-69.

(5) To establish that an employer is liable under Title VII for offensive work environment sexual harassment, a plaintiff must show that:

(i) the employee was a member of a protected class;

(ii) the employee was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature;

(iii) the harassment complained of was based on sex;

(iv) the charged sexual harassment had the effect of unreasonably interfering with the employee's work performance and creating an intimidating, hostile, or offensive working environment that affected seriously the psychological well-being of the employee; and

(v) the existence of respondent superior liability.

Rabidue v. Osceola Refining Co., 805 F.2d 611, 619-20 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987).

(6) Plaintiff is a member of a protected class (females).

(7) Plaintiff was not subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature.

(8) The harassment plaintiff complains of was not based on her sex.

(9) The sexual harassment plaintiff complains of did not have the effect of unreasonably interfering with her work performance and did not create an intimidating, hostile, or offensive working environment that seriously affected plaintiff's psychological well-being.

(10) To hold Ford liable plaintiff must show the existence of respondent superior liability because Meyer, the alleged harasser, was plaintiff's co-worker rather than her supervisor. See Kaufman v. Allied Signal, Inc., 970 F.2d 178, 183 (6th Cir.), cert. denied, __ U.S. __, 113 S.Ct. 831 (1992). Meyer was plaintiffs' co-worker since he never held a supervisory position over plaintiff and since they both held unrelated supervisory positions over different groups of first-line workers. Cf. Rabidue, 805 F.2d at 614-615, 621 n.6. Plaintiff must therefore demonstrate that "[her] employer, through its agents or supervisory personnel, knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action." Id. at 621.

(11) Plaintiff has not shown by a preponderance of the legal evidence that Ford knew or should have known about plaintiff's complaints of sexual harassment. Plaintiff has not shown that Ford failed to respond adequately and effectively when it had notice of the sexual harassment.

(12) In light of these conclusions, the Court finds that plaintiff has not shown that Ford violated her rights under Title VII on her theory of offensive work environment sexual harassment.

Sex Discrimination

(13) Title VII prohibits employers from discharging an individual because of her sex. 42 U.S.C. § 2000-e(2)(A)(1); see supra, p. 8.

(14) To show that an employer violated Title VII by engaging in a discriminatory discharge, a plaintiff must show that:

(i) she is a member of a protected class;

(ii) she was discharged;

(iii) she was qualified for the position; and

(iv) for the same or similar conduct she was treated differently than similarly-situated male employees.

Mitchell v. Toledo Hospital, 964 F.2d 577, 582-83 (6th Cir. 1992).

(15) To show that she was treated differently than similarly-situated male employees, a female plaintiff need not show exact equivalence in situations. She must, however, show that those male employees were similarly-situated in all

respects. Id. at 583. "Thus, to be deemed 'similarly-situated', the individuals with whom the plaintiff seeks to compare . . . treatment must have dealt with the same supervisor, have been the subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." Id. at 583; see also Stotts v. Memphis Fire Department, 858 F.2d 289 (6th Cir. 1988).

(16) If an employer produces evidence showing that a legitimate non-discriminatory reason for the discharge existed, then to prevail the plaintiff must prove that the employer's motivation was discriminatory. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). That is, the plaintiff must prove intentional discrimination. United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983).

(17) It is not necessary for a plaintiff to show that gender was the sole motivating factor in a decision to discharge. Price Waterhouse v. Hopkins, 490 U.S. 228, 240-41 (1989). Once a female plaintiff shows that her gender played a motivating part in the decision to discharge, then an employer may avoid liability only by proving that "it would have made the same decision even if it had not allowed gender to play such a role." Id. at 244-45. Throughout the litigation plaintiffs retain the burden of persuasion on the issue of whether gender played a motivating part in the decision to discharge. Id. at 246. "[T]he employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes

to prevail, must persuade it on another." Id.

(18) Plaintiff is a member of the protected class (females). Ford discharged her from her position as a supervisor in the Batavia plant effective June 21, 1991.

(19) Ford did not discharge plaintiff because of her sex.

(20) Ford did not intentionally treat plaintiff differently than similarly-situated male employees when it discharged her.

(21) Ford's reason for discharging plaintiff - that she was in possession of an unauthorized substance on company property and that she used the substance to assault Meyer, supra, p. 7 - was not a pretext for intentional sex discrimination.

(22) Ford would have made the same decision to discharge plaintiff even if it had not considered her sex.

(23) Plaintiff has therefore failed to show that Ford violated her rights under Title VII by engaging in a discriminatory discharge.

Retaliation

(24) Title VII provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of

> his employees . . . because he has opposed any practice made an unlawful employment practice by this title . . .

42 U.S.C. § 2000e-3(a).

(25) In order to show that an employer violated her rights under Title VII by making a retaliatory employment decision, a plaintiff must show that:

> (i) she engaged in an activity protected by Title VII;
>
> (ii) her exercise of the activity was known to the employer;
>
> (iii) the employer thereafter took an employment action adverse to the plaintiff; and
>
> (iv) there existed a causal connection between the protected activity and the adverse employment decision.

Canitia v. Yellow Freight System, Inc., 903 F.2d 1064, 1066 (6th Cir.), cert. denied, __ U.S. __, 111 S.Ct. 516 (1990).

(26) Ford did not know about plaintiff's exercise of her protected activity at or before the time it transferred her to the third shift in April 1991.

(27) Ford did not, after knowing that plaintiff engaged in a protected activity, take an employment action adverse to plaintiff by transferring her to the third shift in April 1991.

(28) The fact that plaintiff engaged in a protected activity was not a significant factor in Ford's decision to transfer plaintiff to the third shift in April 1991.

(29) Ford's decision to transfer plaintiff to the third shift in April 1991 would have been the same even though it considered her engagement in a protected activity a significant factor in making its decision.

(30) The fact that plaintiff engaged in a protected activity was not a significant factor in Ford's decision to discharge plaintiff.

(31) Ford's decision to discharge plaintiff would have been the same even though it considered her engagement in a protected activity a significant factor in making its decision.

(32) Plaintiff has therefore failed to show that Ford's decision to transfer her to the third shift in April 1991 or Ford's decision to discharge her were done in retaliation for her engagement in activities protected by Title VII.

ORDER

The Court hereby **ORDERS** that:

(1) Plaintiff's motion to stay Title VII decision (doc. no. 84) is **DENIED**;

(2) Plaintiff's claims under Title VII are **DISMISSED** with prejudice.

The case is terminated on the docket of this Court.

IT IS SO ORDERED.

s/ Herman J. Weber
Herman J. Weber, Judge
United States District Court

Supreme Court, U.S.
FILED
JAN 9 1996
CLERK

(2)

No. 95-972

In The

Supreme Court of the United States

October Term, 1995

ROSE ANN ROTHENBUSCH,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JAMES ALAN LIPS
Counsel of Record
DOREEN CANTON
TAFT, STETTINIUS & HOLLISTER
1800 Star Bank Center
425 Walnut Street
Cincinnati, Ohio 45202-3957
(513) 381-2838

Counsel for Ford Motor Company

January, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner waived any objection relating to her first question presented; and if not, whether a plaintiff in a Title VII hostile environment sexual harassment case is required to prove that Respondent, her employer, intentionally discriminated against her because of gender/sex in order to hold Respondent liable for harassment allegedly committed against Petitioner by her estranged husband, a fellow employee?

2. Whether Petitioner waived any objection to the trial court's failure to instruct the jury that the discriminatory intent of the harasser could be proven using a mixed-motives analysis; and if not, whether the burdens of proof established by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), for occasions when an employment decision resulted from the presence of legitimate and illegitimate motives, apply in cases of hostile environment sexual harassment?

3. Whether Petitioner waived any objection to the trial court's instruction on "comparable" employees; whether this Court should grant certiorari to resolve an alleged conflict between Sixth Circuit decisions regarding disparate treatment standards for determining if employees are comparable; and if so, whether the trial court's instruction was erroneous?

LISTING OF PARENT COMPANIES AND SUBSIDIARIES PURSUANT TO RULE 29.1

Respondent, Ford Motor Company, has no parent corporation. The following is a list of domestic and foreign companies in which Ford Motor Company owns an equity interest of at least 10% but less than 100%:

Autolatina America, Inc.
Ford Holdings
Great Mall of the Bay Area Management Company

Argentina
- Autolatina Argentina S.A.
- Invercred Compania Financiera S.A.

Australia
- Ford Motor Company of Australia Limited

Belgium
- Ford Credit N.V.
- Ford Motor Company (Belgium) N.V.

Brazil
- Apolo – Administradora de Bens S/C Ltda.
- Autolatina S.A.

Canada
- TCG, International

Denmark
- Ford Motor Company A/S

Finland
- Oy Ford Ab

Germany
- Ford Werke-Aktiengesellschaft & Co. Leasing KG

Holland
- Ford Nederland B.V.

LISTING OF PARENT COMPANIES AND SUBSIDIARIES PURSUANT TO RULE 29.1 – Continued

Netherlands
Ford Credit B.V.

Norway
Ford Motor Norge A.S.

New Zealand
Ford Motor Company of New Zealand Limited

Singapore
Ford Motor Company Private Limited

South Africa
South African Motor Corporation, Ltd. (SAMCOR)

Sweden
Ford Motor Company Aktiebolag

Switzerland
Ford Motor Company (Switzerland) S.A.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Ford Motor Company respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the Opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit and the decision and opinion of the United States District Court for the Southern District of Ohio are unreported and are printed in Petitioner's Appendix.

COUNTERSTATEMENT OF THE CASE

Petitioner has selectively presented the facts to downplay the mutual domestic relations battle in which she and her estranged husband, who she met and married while both worked at Ford and who was on the same supervisory level as she, were engaged outside of work and at the Ford plant. They used the Ford plant as their personal battleground over the objection of Ford and despite its reasonable efforts to prevent it. It is this marriage dissolution context which distinguishes this case from most other hostile environment sexual harassment cases.

Petitioner seeks to hold Respondent responsible for not sufficiently siding with her in her war with her

estranged husband who she accused of sexual harassment. Whatever actions her estranged husband committed toward Petitioner, she made a major contribution to the hostility in the workplace. She had him arrested at the plant several times, once just after they separated and once after they had a verbal altercation in the plant cafeteria. She had him arrested numerous other times outside of work. Their domestic problems were heard by various state courts. To Ford employees, she called him a "bastard" and a "son of a bitch" and said he was impotent. Derogatory posters depicting Petitioner's estranged husband as a "jailbird" and a baby crying because she "told him they were through" were posted in the plant. *Rothenbusch v. Ford Motor Co.*, Case No. 93-3943 at 2-3 (6th Cir. July 20, 1995). There was no evidence that any other Ford employee, male or female, complained about or was offended by the environment created by Petitioner and her estranged husband. They focused their hostility on one another only. The other Ford employees saw the situation for exactly what it was – a personal dispute motivated by personal hatred, anger and revenge being fought out in the workplace with words and posters. Ford did not condone any of it, and took reasonable steps to stop it. One day, Petitioner escalated her activities to physical assault. She drove across the plant on a scooter to her estranged husband's work area and, without warning or apparent provocation at the scene, sprayed him in the face with a mace-like chemical weapon. She untruthfully denied this assault, but it was witnessed by third parties. *Id.* at 4; District Court Findings of Fact No. 15. Ford discharged Petitioner for that assault, and later

appropriately disciplined her estranged husband for the two occasions a witness saw him posting a poster.

The first two questions raised by Petitioner are directed at Respondent's failure to guarantee that posters derogatory to her would not be posted in the plant, and if they were, that Ford would discipline her estranged husband whether or not it could prove he was responsible for the postings. Title VII was not designed for these purposes; and even if it was, Petitioner did not prove her case. The third question is directed at the relevance of comparisons for judging disparate treatment.

REASONS WHY THE PETITION SHOULD BE DENIED

A petition for a writ of certiorari "will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10. In cases such as the present one, this normally requires that:

> [A] United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; . . . [or] has decided an important question of federal law which has not been, but should be, settled by this Court.

Sup. Ct. R. 10.1(a), (c). None of the issues raised in the Petition satisfy this Court's stringent requirements for granting a writ of certiorari.

First, Petitioner waived her right to challenge in this Court any of the three questions presented. She did not object to the jury instruction requiring that harassment be

"based on sex" or to the instruction requiring comparisons of only "similarly situated" employees, nor did she object to the lack of an instruction to apply a mixed-motives analysis to her sexual harassment claim. Second, this case is heavily fact dependent, and impacts only the litigants. The jurisprudence of sexual harassment will not be advanced by granting this Petition, because none of the questions presented raises any "special and important reasons" for review by this Court. Third, the Sixth Circuit's decision is not inconsistent with that of any of the other Circuits of the United States Court of Appeals. Finally, reversal of the Sixth Circuit's decision on any one or all of the three grounds raised by Petitioner would not affect the outcome of the case, as the jury found against Petitioner on every other element of her hostile environment sexual harassment and sex discrimination claims, and she has not appealed those findings. Thus, the Petition should be denied.

I. PETITIONER WAIVED HER RIGHT TO OBJECT TO THE "PERSONAL ANIMOSITY" JURY INSTRUCTION, THE SIXTH CIRCUIT PROPERLY UPHELD THE INSTRUCTION, AND THERE IS NO CONFLICT IN THE COURT OF APPEALS ON THIS ISSUE.

Petitioner was not required to prove the discriminatory intent of a "co-worker harasser," as her first question presented suggests. The instruction objected to merely required Petitioner to prove that the alleged harassment was "based on sex," and concluded that: "Personal animosity is not the equivalent of sexual harassment and is not proscribed by law." Petitioner waived any objection

to this instruction. In fact, as the Sixth Circuit noted, Petitioner's counsel:

> [s]eemed to agree with the "personal animosity" aspect of the charge. He stated: "I don't have any problem with the statement that 'personal animosity is not the equivalent of sexual harassment as proscribed by law,' in that general concept."

(Court of Appeals Opinion at 6 n.5) Now Petitioner is barred from having the instruction reviewed by this Court. Fed. R. Civ. P. 51; *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815 (1985) (jury instruction question not preserved for review unless petitioner objects at trial with sufficient specificity to satisfy Rule 51). There was no instruction about intent, no special verdict about it, and no discussion about it by the Court of Appeals. The importance of the intent of Petitioner's estranged husband was not an issue before the jury and was not properly preserved for this Court.

Even if Petitioner's first question could be considered by the Court, there is no reason for such consideration. Whether Petitioner's estranged husband was responsible for posting all of the offensive posters or, if so, whether he intended to harass her because of her gender/sex status rather than because of his personal animosity due to their failed marriage, such does not prove that Respondent was responsible for illegal gender/sex harassment. Respondent's responsibility under the law does not turn on Petitioner's estranged husband's intent. The jury found that Respondent did not sexually harass or permit harassment against Petitioner because of

gender/sex, regardless of any action or motive by her estranged husband.

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an *employer* . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65-66 (1986), this Court held that sexual harassment is a form of sex discrimination prohibited by Title VII, and that "a plaintiff may establish a violation of Title VII by proving that discrimination *based on sex* has created a hostile or abusive work environment." An employer that creates or condones a work environment which is discriminatorily hostile or abusive to members of a protected class, such as women, is thereby discriminating "with respect to . . . terms [and] conditions . . . of employment." *Id.* at 66. The essence of Title VII, indeed of all employment protective laws that prohibit discrimination or retaliatory conduct, proscribes employer conduct "because of" protected status, regardless of the nature of the conduct used for the harassment. It is the intent or motive of the employer that is the cause or reason that moves the will and induces or fails to induce action which may be proscribed. As this Court recently affirmed in *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1708 (1993):

> Disparate treatment . . . is the most easily understood type of discrimination. *The employer* simply treats some people less favorably than others because of their . . . [protected characteristics]. *Proof of discriminatory motive is critical,*

> although it can in some situations be inferred from the mere fact of differences in treatment . . .
>
> In a disparate treatment case, liability depends on whether the protected trait actually *motivated* the employer's decision.

(quoting *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)) (emphasis added). Thus, Respondent's responsibility turns on its motive for acting or failing to act, and not on the motives of Petitioner's estranged husband.

Moreover, the real reason Petitioner lost this case was that the basis for the harassment was not gender/sex as proscribed by Title VII. The Sixth Circuit correctly held that the District Court did not err in instructing the jury that:

> To show that the alleged harassment was based on sex, Plaintiff must prove by a preponderance of the legal evidence that but for the fact of her sex, she would not have been the object of illegal harassment. Harassment is prohibited by Ohio law only if it is based on being male or female. Personal animosity is not the equivalent of sexual harassment and is not proscribed by law.

As the Court of Appeals noted, the jury instruction was consistent with the law, and sufficiently clear to avoid confusion.

Title VII requires discriminatory conduct to be "because of sex," as this Court has so held in its two cases dealing with hostile environment sexual harassment. *See Meritor*, 477 U.S. at 66 ("discrimination based on sex"); *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 371 (1993) ("a

work environment abusive to employees because of their . . . gender"). *Harris* repeatedly emphasized that sexual harassment is a form of disparate treatment sex discrimination. 114 S. Ct. at 370-71 (Title VII violated only if "*discriminatory* conduct was so severe or pervasive that it created a work environment abusive to employees *because of* their . . . gender"; "*discriminatory* intimidation, ridicule and insult"; "[a] *discriminatorily* abusive work environment") (emphasis added). The first two sentences of the instruction, therefore, are verbatim statements from the language of Title VII and this Court's holdings.

The last sentence of the instruction (the one to which Plaintiff's counsel stated he had no objection) is simply a clarification of the "based on sex" requirement. Personal animosity is not the same as intentionally exposing members of one sex "to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Harris*, 114 S. Ct. at 372 (Ginsburg, J., concurring). In the context of the unique facts of this domestic relations battle, the instruction was necessary so the jury would not confuse the issues, as it is the discriminatory intent of the employer to create or condone a hostile environment that is crucial, not the intent of the harasser or the character or nature of the tools of harassment. *See Katz v. Dole*, 709 F.2d 251, 256 n.7 (4th Cir. 1983) (burden is on plaintiff to prove intentional employer harassment); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) (offensive workplace conduct need not be of a sexual character so long as discrimination is based on gender). The language of Title VII is clear:

> [T]he phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies

> that it is unlawful to discriminate against women because they are women and against men because they are men.

Ulane v. Eastern Airlines, 742 F.2d 1081, 1085 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985).

In this case, the jury listened to almost two weeks of evidence and concluded that despite the sexual content of the posters, Petitioner did not prove harassment "based on sex."[1] No legal error occurred warranting this Court's review.

There is no conflict among the Circuits in the Court of Appeals regarding Title VII's requirement that a plaintiff alleging hostile environment sexual harassment must prove by a preponderance of the evidence that the harassment was "based on" gender/sex. Not one of the cases cited by Petitioner has held otherwise. Moreover, not one case cited by Petitioner has held that a plaintiff may prove an employer responsible for hostile environment harassment merely because the harasser intended to discriminate on the basis of gender/sex. Not one case cited by Petitioner has even mentioned, let alone analyzed, the

---

[1] Also the jury found Petitioner did not prove the other elements of a hostile environment sexual harassment claim – she was not subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; Ford did not unreasonably interfere with her work performance and create an intimidating, hostile or offensive working environment that seriously affected her psychological well-being; Ford did not know/should have known of any harassment; and Ford did not fail to respond adequately and effectively. Special Verdict, Nos. 1, 3, 4, 5 (Appendix).

issue. *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), discussed the harasser's motivation only in the context of the requirement that the harassment be severe or pervasive enough to create an objectively hostile or abusive work environment. The court cautioned that conduct can be unlawful sexual harassment "even when harassers do not realize that their conduct creates a hostile working environment." 924 F.2d at 879-80. Thus, it is the reasonable person's perspective, not the harasser's, that is applied to determine the severity or pervasity of the conduct. *Harris*, 114 S. Ct. at 370. Nearly every case Petitioner cites specifically requires, as was required in this case, a Title VII plaintiff alleging sexual harassment to prove intentional discrimination "based on" gender/sex. *See Bouton v. BMW of North America*, 29 F.3d 103, 106 (3d Cir. 1994) (hostile environment claim requires proof of severe or intentional discrimination); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990) (plaintiffs must show they "suffered intentional discrimination because of their sex"); *Katz v. Dole*, 709 F.2d 251, 255 n.7 (4th Cir. 1983) (ultimate burden is on plaintiff to "prove existence and intentional nature of the harassment"); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 619-20 (6th Cir. 1986) (relying on EEOC guidelines for requirement that plaintiff prove "she would not have been the object of harassment but for her sex"), *cert. denied*, 481 U.S. 1041 (1987); *McKinney v. Dole*, 765 F.2d 1129, 1138 n.21 (D.C. Cir. 1985) (potential difficulty of proving element that harassment be caused "by the sex of the harassed employee" is "simply an evidentiary problem going to one factual component of the discrimination"); *Carrero v. New York City Housing Authority*, 890 F.2d 569, 578 (2d

Cir. 1989) (plaintiff required to prove the conduct was prompted simply because of the employee's gender); *Hutchison v. Amateur Electronic Supply, Inc.*, 42 F.3d 1037, 1043 (7th Cir. 1994) ("This disparate effect [treating women differently] is the discriminatory element in a hostile environment."); *King v. Board of Regents of the University of Wisconsin System*, 898 F.2d 533, 539 (7th Cir. 1990) ("All that is required is that the action taken be motivated by the gender of the plaintiff."); *Trautvetter v. Quick*, 916 F.2d 1140, 1149-51 (7th Cir. 1990) (must show "*intentional discrimination* based upon an individual's membership in a particular class" . . . "an intent to discriminate *because* of her status as a female and not because of characteristics of her gender which are personal to her"); *Kopp v. Samaritan Health System*, 13 F.3d 264, 269 (8th Cir. 1993) (plaintiff must show "the harassment was based on sex"); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1413, 1415 (10th Cir. 1987) (relying on *Meritor* and EEOC guidelines for requirement that harassment be "on the basis of sex"); *Jones v. Flagship International*, 793 F.2d 714, 719 (5th Cir. 1986) ("factual inquiry is intentional discrimination"; plaintiff must show "the harassment complained of was based upon sex, *i.e.*, that but for the fact of her sex, the plaintiff would not have been the object of harassment"), *cert. denied*, 479 U.S. 1065 (1987); *Huddleston v. Roger Dean Chevrolet*, 845 F.2d 900, 904 (11th Cir. 1988) (harassment must occur "because of her sex"); *Henson v. City of Dundee*, 682 F.2d 897, 903-04 (11th Cir. 1982) (plaintiff must show that "but for the fact of her sex, she would not have been the object of harassment"); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1315 (11th Cir. 1989) ("because of such individual's . . . sex");

Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1522 (M.D. Fla. 1991) (one element of hostile environment sexual harassment claim is "the harassment complained of was based upon sex").

There is no confusion among the Circuits of the Court of Appeals – all require employer intent to discriminate based on gender/sex.

II. PETITIONER WAIVED HER RIGHT TO OBJECT TO THE LACK OF A MIXED-MOTIVES INSTRUCTION, THERE IS NO CONFLICT IN THE COURT OF APPEALS ON THE INAPPLICABILITY OF SUCH AN INSTRUCTION IN A HOSTILE ENVIRONMENT SEXUAL HARASSMENT CASE, AND PETITIONER WAS NOT PREJUDICED ANYWAY.

The second question presented by Petitioner is whether in a hostile environment sexual harassment case discriminatory intent of the harasser may be proven "using a mixed-motives analysis." Petitioner did not raise this question before the trial court or the Court of Appeals, it was not argued or briefed by either side, and neither court addressed the issue. Neither Petitioner nor Respondent requested a "mixed-motives" jury instruction on the sexual harassment claim, and none was given regarding this claim. The District Court's jury instruction did not force the jury to choose between two motives, of the harasser or Petitioner. It did not mention "motive"; the instruction simply required Petitioner to prove that the alleged harassment was "based on sex." Petitioner's "mixed-motives" question is purely hypothetical, and is not an issue ripe for consideration in this case.

Even if the issue had been raised and not waived, there is no conflict for this Court to resolve because no Circuit of the Court of Appeals has held that a plaintiff may prove intentional hostile environment sexual harassment using a mixed-motives analysis. To the contrary, the Eighth Circuit recently held:

> The mixed-motives analysis is inapplicable to a hostile-work-environment claim. The analysis was designed for a challenge to "an adverse employment decision in which both legitimate and illegitimate considerations played a part."
>
> An employer could never have a legitimate reason for creating a hostile work environment. "Rather, the key issue" in analyzing a hostile-work-environment claim " 'is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.' "

Stacks v. Southwestern Bell Yellow Pages, 27 F.3d 1316, 1326 (8th Cir. 1994) (citations to *Price Waterhouse* and *Harris* omitted). Petitioner cites no case to the contrary. *EEOC v. Farmer Brothers Co.*, 31 F.3d 891 (9th Cir. 1994), advanced by Petitioner, does not conflict with *Stacks*. *Farmer Brothers* merely held that evidence of motive was relevant to establishing sex discrimination in a discharge case. *Id.* at 897.

Likewise, no Court of Appeals has considered, even in passing, the question of whether, notwithstanding the intent of the employer, the intent of a co-worker harasser

may be proven by a mixed-motives analysis. That is because the mixed-motives analysis applies to employer intent, the crucial factor in a Title VII case. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-242, 250, 252 (1989) (plaintiff must show that "an impermissible motive played a motivating part in an adverse employment decision"; the "very premise of a mixed-motives case is that a legitimate reason was present"). The cases cited by Petitioner all require *employer* intent to discriminate on the basis of sex. *See Trautvetter v. Quick*, 916 F.2d 1140, 1150 (7th Cir. 1990) (equal protection quid pro quo case); *Huebschen v. Dept. of Health and Social Services*, 716 F.2d 1167, 1172 (7th Cir. 1983) (equal protection quid pro quo case); *Bundy v. Jackson*, 641 F.2d 934, 943, 946 (D.C. Cir. 1981); *Spain v. Gallegos*, 26 F.3d 439, 447-49 (3d Cir. 1994); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990); *Farmer Brothers*, 31 F.3d at 898 (disparate treatment sex discrimination case); *Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959, 964 (8th Cir. 1993).

Finally, the question of whether a legitimate motive is an affirmative defense to liability only arises *after* an employer is found to have had an illegitimate motive. *Price Waterhouse*, 490 U.S. at 258. Petitioner wrongly suggests that the jury should have been permitted to simply choose whether a legal or illegal motive was more likely. (Petition at 15) Petitioner misperceives *Price Waterhouse*. *Price Waterhouse* did not lighten Petitioner's burden of proving that her gender/sex was considered by Respondent when it acted or failed to act. *Id.* at 254-58, 269, 307,

316. Because the jury found no illegal gender/sex harassment of Petitioner was proven, it had no reason to consider whether a legal motive provided an affirmative defense to liability.

III. PETITIONER WAIVED HER RIGHT TO OBJECT TO THE "COMPARABLE EMPLOYEES" JURY INSTRUCTION, ANY INTRA-CIRCUIT CONFLICT IS NOT FOR THIS COURT TO RESOLVE, AND THERE IS NO CONFLICT WITHIN THE SIXTH CIRCUIT ON THIS ISSUE.

Petitioner's third question was not presented to the Court of Appeals for the Sixth Circuit, and thus should not be considered by the Supreme Court.

Furthermore, doubts or conflicts between different panels of a Court of Appeals "should not be the occasion for invoking so exceptional a jurisdiction of this Court as that on certification. It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

Finally, there is no conflict between decisions in the Sixth Circuit regarding the use of comparables in evaluating disparate treatment claims. The trial court relied upon *Mitchell v. Toledo Hospital*, 964 F.2d 577, 583 (6th Cir. 1992), which held that "comparables" in disparate treatment cases must be "similarly-situated in *all respects*." *Pierce v. Commonwealth Life Insurance Co.*, 40 F.3d 796 (1994), requires a plaintiff to prove that "all of the relevant aspects of his employment situation are 'nearly identical' " to those of the employees he claims were treated more favorably. *Id.* at 802. In this case, the trial court recognized that

"[t]o show that she was treated differently than similarly situated male employees, a female plaintiff need not show exact equivalence in situations." The *Mitchell* and *Pierce* tests are not different, but even if they are, Petitioner loses under both tests, because the "comparable employee" Petitioner sought to use was neither "similarly-situated in all respects" nor "nearly identical." There was no error of admissibility of evidence warranting review by this Court.

CONCLUSION

The Petition does not present any "special and important reasons" for this Court to issue a writ of certiorari to review the questions raised by Petitioner. Respondent respectfully requests that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be denied.

Respectfully submitted,

James Alan Lips
Counsel of Record
Doreen Canton
Taft, Stettinius & Hollister
1800 Star Bank Center
425 Walnut Street
Cincinnati, Ohio 45202-3957
(513) 381-2838
Counsel for Ford Motor Company

APPENDIX

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROSE ANN ROTHENBUSCH,	:	
Plaintiff,	:	
v.	:	CASE NO. C-1-91-860
FORD MOTOR COMPANY,	:	
Defendant.	:	

SPECIAL VERDICT

We, the jury, unanimously determine our Special Verdict as follows:

ISSUES – SEXUAL HARASSMENT

1. Has the plaintiff, Rose Ann Rothenbusch, proved by a preponderance of the legal evidence that she was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature?

YES ___ NO X

2. Has the plaintiff, Rose Ann Rothenbusch, proved by a preponderance of the legal evidence that the harassment complained of was based on sex?

YES ___ NO X

3. Has the plaintiff, Rose Ann Rothenbusch, proved by a preponderance of the legal evidence that the sexual harassment had the effect of unreasonably interfering with her work performance and creating an intimidating,

hostile, or offensive working environment that seriously affected her psychological well-being?

YES ___ NO X

4. Has the plaintiff, Rose Ann Rothenbusch, proved by a preponderance of the legal evidence that defendant, Ford Motor Company, knew or should have known of the sexual harassment?

YES ___ NO X

5. Has plaintiff, Rose Ann Rothenbusch, proved by a preponderance of the legal evidence that Ford failed to respond adequately and effectively when it had notice of the sexual harassment?

YES ___ NO X

ISSUES – SEX DISCRIMINATION

6. Has plaintiff proved by a preponderance of the legal evidence that Ford discharged plaintiff because of her sex?

YES ___ NO X

7. Has plaintiff proved by a preponderance of the legal evidence that when Ford discharged her, Ford intentionally treated her differently than similarly situated male employees because of her sex?

YES ___ NO X

8. Has plaintiff proved by a preponderance of the legal evidence that Ford's reason for terminating

plaintiff's employment was a pretext for its intentional sex discrimination?

YES ___ NO X

9. Has Ford proved by a preponderance of the legal evidence that it would have made the same decision to terminate plaintiff even it if had not considered her sex?

YES X NO ___

ISSUES – RETALIATION

10. Has the plaintiff, Rose Ann Rothenbusch, proved by a preponderance of the legal evidence that her exercise of a protected activity was known to Ford at or before the time Ford transferred her to the third shift?

YES ___ NO X

11. Has the plaintiff, Rose Ann Rothenbusch, proved by a preponderance of the legal evidence that Ford, after knowing that plaintiff engaged in a protected activity, took an employment action adverse to her by transferring her to the third shift?

YES ___ NO X

12. Has the plaintiff, Rose Ann Rothenbusch, proved by a preponderance of the legal evidence that the fact plaintiff engaged in a protected activity was a significant factor in Ford's decision to transfer her to the third shift?

YES ___ NO X

13. Has the plaintiff, Rose Ann Rothenbusch, proved by a preponderance of the legal evidence that the

fact plaintiff engaged in a protected activity was a significant factor in Ford's decision to discharge plaintiff?

YES ___ NO X

14. Has defendant, Ford Motor Company, proved by a preponderance of the legal evidence that its employment decision to transfer plaintiff to the third shift would have been the same even though it considered her engagement in a protected activity a significant factor in making its decision?

YES X NO ___

15. Has defendant, Ford Motor Company, proved by a preponderance of the legal evidence that its employment decision to discharge plaintiff would have been the same even though it considered her engagement in a protected activity a significant factor in making its decision?

YES X NO ___

ISSUES – DAMAGES

16. What amount of money, if any, has Paintiff proved by the preponderance of the legal evidence to be her damages proximately caused by Defendant's discharge of Plaintiff?

Backpay to date	$ 0
Other compensatory damages to date	$ 0
Front pay – (reduce to present worth)	$ 0

Other future compensatory damages (reduce to present worth) $___0___$

17. What amount of money, if any, has Plaintiff proved by the preponderance of the legal evidence to be her compensatory damages proximately caused by Defendant's sexual harassment of Plaintiff?

$___0___$

18. What amount of money, if any, has Plaintiff proved by the preponderance of the legal evidence to be her compensatory damages proximately caused by Defendant's transfer of Plaintiff to the third shift?

$___0___$

19. What amount of money, if any, has defendant proved by a preponderance of the legal evidence plaintiff should have mitigated and/or reduced her damages?

$___0___$

20. Has plaintiff proved by clear and convincing legal evidence that punitive damages should be assessed against the defendant?

YES ___ NO X

21. What amount of money, if any, has plaintiff proved by clear and convincing legal evidence should be assessed against the defendant?

$___0___$

S/ David W. Rush	S/ David Feist
S/ Marilyn A. Melia	S/ Herschell H. Hall
S/ Mary C. Spoerl	S/ John E. Vierling
S/ Ronald J. Willing	S/ Wendell Campbell

Feb. 23, 1993
Date

Supreme Court, U.S.
FILED
JAN 18 1996
CLERK

No. 95-972

SUPREME COURT OF THE UNITED STATES

October Term, 1995

ROSE ANN ROTHENBUSCH,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND NOW LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

FREDERICK M. GITTES
Spater, Gittes, Schulte & Kolman
723 Oak Street
Columbus, Ohio 43205
(614) 221-1160

LOUIS A. JACOBS
4905 Stonehaven Drive
Upper Arlington, Ohio 43220
(614) 459-5690
Counsel of Record

QUESTION PRESENTED

WHETHER SPECIFIC INTENT TO DISCRIMINATE ON THE BASIS OF SEX IS A NECESSARY ELEMENT IN PROVING AN EMPLOYER HAS INFLICTED A HOSTILE ENVIRONMENT ON AN EMPLOYEE IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964?

LIST OF PARTIES

The parties to the proceedings and in this Court are Petitioner Rose Ann Rothenbusch, the plaintiff-appellant below, and Respondent Ford Motor Company, the defendant-appellee below. *Amici Curiae* in this Court are the National Employment Lawyers Association and the NOW Legal Defense and Education Fund. The interests and background of *Amici Curiae* are described in the motion for leave to file this brief.

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MOTION OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND NOW LEGAL DEFENSE AND EDUCATION FUND FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The National Employment Lawyers Association ("NELA") and the Now Legal Defense and Education Fund ("NOW LDEF") move the Court, pursuant to U.S. Sup. Ct. R. 21.2(b), for leave to file a brief *Amici Curiae* in support of the petition for writ of certiorari because, in the words of U.S. Sup. Ct. R. 37.1, they can "bring[] relevant matter to the attention of the Court that

has not already been brought to its attention by the parties." Beginning with a reformulation of the primary question presented by Petitioner and continuing through a description of how the holding by the court below has broad and untoward factual and legal consequences, their brief contributes knowledge and insight in the area of sexual harassment garnered through years of nationwide litigation, education, and advocacy.

By identifying aspects of the question presented that were omitted from the Petition and are unlikely to be discussed in Respondent's brief, *Amici Curiae* can supply the Court with a better appreciation of the importance of the question presented and its practical ramifications. *Amici Curiae* add a perspective that private counsel representing a single client is rarely able to provide.

NELA is a non-profit professional organization comprised of over 2,000 lawyers in 48 States and the District of Columbia who represent individual employees and applicants in employment and labor matters. NELA regularly sponsors continuing legal education programs; publishes newsletters, including THE EMPLOYEE ADVOCATE, which is an extensive supplement of materials to members updating developments in employment and labor law and sharing their experience in this field; operates an electronic forum, NELANet; testifies before legislatures; and submits *amicus curiae* briefs in federal and State courts throughout the country. *See, e.g., Morales v. Barge-Wagener Construction Co.*, 114 S. Ct. 579 (1993)(memorandum order granting NELA leave to file a brief *amicus curiae*).

Sexual harassment has often been a topic of NELA publications and presentations, and thousands of sex discrimination claims have been pursued by NELA members. NELA has filed *amicus* briefs in sexual harassment cases. *See, e.g., Clarke v. Kentucky Fried Chicken of California, Inc.*, 57 F.3d 21, 22 (1st Cir.

1995); *Popovich v. Irlando*, 811 P.2d 379, 380 (Colo. 1991).

NOW LDEF is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization of Women. Since then, NOW LDEF has often appeared as an *amicus curiae* in this Court. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 592 (1988) (referring to NOW LDEF brief *amicus curiae*); *New York State Club Association, Inc. v. City of New York*, 487 U.S. 1, 3 (1988)(same); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 712 (1983)(same).

A major goal of NOW LDEF is the elimination of barriers that deny women economic opportunities, and sexual harassment has been one of the most problematic of those barriers. In furtherance of that goal, NOW LDEF litigates cases to secure full enforcement of laws prohibiting sexual harassment. *See, e.g., Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), *cross appeals dismissed per stipulation* (11th Cir. 1995); *Townsend v. Indiana University*, 995 F.2d 691 (7th Cir. 1993). NOW LDEF has also filed *amicus* briefs in sexual harassment cases. *See, e.g., Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993).

Although Petitioner has consented to the filing of this brief *amici curiae*, Respondent has not given consent. Consequently, leave to file is required.

Respectfully submitted,

FREDERICK M. GITTES
Spater, Gittes, Schulte & Kolman
723 Oak Street
Columbus, Ohio 43205
(614) 221-1160

LOUIS A. JACOBS
4905 Stonehaven Drive
Upper Arlington, Ohio 43220
(614) 459-5690
Counsel of Record

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PETITION

Amici Curiae National Employment Lawyers Association and NOW Legal Defense and Education Fund respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on July 20 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is not reported and has been reprinted in the appendices to the Petition for Writ of Certiorari docketed on December 21, 1995. The opinion of the United States District Court for the Southern District of Ohio is also not reported and has similarly been reprinted in the appendices to the Petition.

JURISDICTION

This action arose under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*; Ohio Laws Against Discrimination, Ohio Rev. Code §4112.02(A); and Ohio common law, and jurisdiction was vested in the United States District Court for the Southern District of Ohio by 28 U.S.C. §§ 1331; 1367. The appeal was predicated on 28 U.S.C. §1291. This Court's jurisdiction arises under 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

§703(A) OF TITLE VII, 42 U.S.C. §2000e-2(a)

It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§4112.02(A), OHIO REVISED CODE

It shall be an unlawful discriminatory practice:

(A) For any employer, because of race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

STATEMENT OF THE CASE

Amici Curiae adopt the Statement of the Case submitted in the Petition for Writ of Certiorari. The point crucial to the question here presented is the appellate court affirmance of jury instructions precluding a finding of a sexually hostile environment when the harasser was motivated by personal animosity. The courts below were construing Title VII of the Civil Rights Act of 1964 to supply the legal standards applicable under Ohio's parallel statute.

REASONS FOR GRANTING THE WRIT

I. Summary

Emerging in the lower federal courts is a broken-romance defense to liability for a sexually hostile work environment. The harasser and employer are being excused when the target had initially welcomed a relationship. Thus, the appellate court below could predicate its opinion on the observation that "[t]his case appears to be the classic story of workplace romance turned sour." App. 1-2. *See also, Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 468 (8th Cir. 1995)("This case concerns a workplace romance gone awry.").

The legal issue reflected in the crucial jury instructions given in this case focuses on the motivation for the hostile environment. Under such instructions, the key question mistakenly becomes whether the ex-lover, who demonstrably had imposed a sexually hostile environment, was ***merely*** venting personal animosity. That the environment was the product of such a motivation then creates immunity from liability.

These instructions effectively require proof of a specific intent to discriminate. That requirement depends on the notion that a sexually hostile work environment imposed by the ex-lover and tolerated by the employer is permissible if neither was motivated specifically by sex. This notion is flatly inconsistent with equal employment opportunity laws, misconstruing them to require proof beyond the general intent to discriminate readily inferred from imposition of a sexually hostile work environment.

Lower courts have decided this important legal issue under Title VII in a way that deviates from this Court's precedent on Title VII's protection from sex discrimination. The petition should, therefore, be granted.

II. Concocting a Defense by Requiring Proof of Specific Intent.

Increasingly, employers are attempting to distinguish discriminatory intent from personal animus. They tend to borrow specific intent concepts from precedent on retaliation, *Ashkin v. Time Warner Cable Corp.*, 52 F.3d 140, 144 (7th Cir. 1995)("her complaints arose solely out of a non-sexual personality clash between two aggressive individuals"), or constructive discharge, *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 887-88 (3d Cir. 1994)(surveying cases that "appear to have required a finding that discrimination complained of amounted to an intentional course of conduct calculated to force the victim's resignation" and rejecting them in favor of "an objective standard, requiring no more than a finding that the conduct complained of would have the foreseeable result that working conditions would be so unpleasant").

Of course, a specific intent to discriminate is actionable whenever harassment in any form occurs. Even absent specific intent, though, a general intent to discriminate may be inferred under equal employment opportunity laws when the harassment itself is of a sexual nature. The error of the courts below is their confusion of proof ***sufficient*** to state a claim for a sexually hostile work environment -- specific intent -- with proof ***necessary*** for that claim -- general intent. Whether the intent behind the sexually hostile work environment is personal animosity or perversity becomes irrelevant when the effect by any objective analysis is a work atmosphere polluted by sex-related harassment.

A. Nature of Hostile Environment

This Court has twice directly addressed sexual harassment claims under Title VII. In *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993), this Court rejected the approach in some federal appellate circuits that required

targets to present evidence of a severe psychological effect from the hostile environment. This Court recognized that interference with the terms and conditions of employment will usually occur before the target's injury reaches that level and that the totality of circumstances, including frequency, severity, physical or verbal nature, and the effect on the victim, must be considered.

A key passage in *Harris v. Forklift Systems, Inc.*, *supra*, 114 S. Ct. at 270, emphasized the proper focus on the effect a sexually hostile work environment has on women:

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive -- is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 557 (1986), this Court was similarly concerned with pollution of the environment by sex-based hostility. The intent element in typical sexual harassment claims was nearly assumed: "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." 477 U.S. at 64. The employer's attempt to limit Title VII to tangible economic loss was then rejected in *Vinson* because the statute prohibits the "entire spectrum of disparate treatment." *Id.* Finally, the Equal Employment Opportunity Commission (EEOC) guidelines, 29 C.F.R. §1604.11(a)(3), were approvingly cited for reaching harassment that had the purpose ***or*** effect of creating a hostile environment.

These decisions and their rationales strongly suggest that specific intent is ***not*** required to prove a hostile environment. Personal motivations, ranging from animosity to lust to a simple inability to control one's workplace conduct, are often used by plaintiffs to explain why the harasser imposed a sexually hostile work environment. The jury instruction approved by the appellate panel below transformed these motivations into ***exculpatory*** evidence.

B. Intent under Title VII.

As a general matter specific intent is not required to prove a violation of Title VII. No greater burden should be imposed in sex discrimination cases. Early precedent focused on the remedial provision, 42 U.S.C. §2000e-5(g), which refers to an employer found to have "intentionally engaged in . . . an unlawful employment practice." This element of intent was construed to require "only that the defendant meant to do what he did, that is, his employment practice was not accidental." *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980, 996 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). This approach to intent was also used when employers invoked protective laws to demonstrate their good faith. *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1006 (9th Cir. 1972).

Imposition of a specific intent requirement for proof of a sexually hostile work environment claim has, however, been erroneously justified by the language in Title VII's prohibition of disparate treatment: "because of sex". Importantly, a general intent satisfies that standard. Indeed, there is a contradiction in terms when a court finds insufficient proof of differential treatment because of sex on a record that, based on any objective analysis, is replete with extensive harassment of a sexual nature.

This Court has not addressed the legal issue of whether the requisite intent to discriminate can be inferred from harassment of a sexual nature. *Cf. Harris v. Forklift Systems, Inc.*, *supra*, 114 S. Ct. at 372 (1993)(Ginsburg, J., concurring)("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.").

Usually a hostile environment is inflicted through sex-related behavior. That the subjective motivation of the harasser is personal animosity should make no difference in that situation. Only by converting Title VII into a specific intent statute would motivation in such circumstances matter. The fundamental argument against a specific intent requirement where harassment of a sexual nature is involved is that, whatever motivated that harassment, the employer violates Title VII by forcing the employee to suffer it as a term or condition of employment.

C. Reinforcing the Floodgates.

Lower courts seem concerned that a flood of Title VII actions will overwhelm dockets in light of the persistence of workplace romance and the multifarious motivations underpinning sexual harassment. This concern that every workplace romance will sour into a federal claim is unwarranted. The facts in *Cram v. Lamson & Sessions Co.*, *supra*, a case where no sexual harassment was found, illustrate that clean breaks can be made without imposing a hostile environment.

The case involved an ex-lover who "made no sexual comments, threats, or references to her job status" and supervisors' decisions that, while "implying a personal dislike or distrust of Cram herself," were "not the same as statements found to imply discriminatory attitudes toward women as a group" or those "based on discriminatory

attitude toward women." 49 F.3d at 469, 472. The critical aspect of the facts was that the ex-lover "did not make any sexual comments, advances or requests after their consensual relationship ended;" indeed, his efforts to woo back his lover were not entirely fruitless. 49 F.3d at 472 (plaintiff had accepted an expensive Valentine's Day gift).

Their supervisor/subordinate relationship at work was totally asexual and professional: the supervisor never "brought any personal issues into their discussion" of a leave request, and his "workplace interactions with Cram during the period following the breakup of their relationship were brief, sporadic, nonsexual, nonthreatening, and polite." 49 F.3d at 473-74. Absent "inappropriate language or . . . sexual or intimidating comments either in person or in the notes," a hostile environment could not be established. 49 F.3d at 475.

In contrast, *Amici* respectfully suggest that, as in the instant case, an actionable hostile environment would arise when personal animosity stemming from a broken romance is implemented by sexual means at the workplace. *Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959, 965 (8th Cir. 1993), involved a spurned would-be lover, but the court's rejection of a personal animosity defense, which it described as a "callous explanation," is illustrative: "There is no excuse in any work environment for subjecting a female worker to such verbal abuse even if the harasser and the plaintiff did not like each other." There is even less excuse for the sort of harassment Petitioner suffered, which included dissemination through the workplace of pornographic drawings identifying her by name.

D. Inferring General Intent to Discriminate.

A general discriminatory intent is intrinsic to a sexually hostile work environment. "The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual

derogatory language is implicit, and thus should be recognized as a matter of course." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n. 3 (3d Cir. 1990).

A general intent to discriminate may be inferred even when the harassment does not amount to a sexual assault. "[A]n employee can demonstrate that there is a sexually hostile work environment without proving blatant sexual misconduct." *Spain v. Gallegos*, 26 F.3d 439, 447 (3d Cir. 1994). *Accord Burns v. McGregor Electronic Industries, Inc.*, *supra*, 989 F.2d at 964 ("Sexual harassment can take place in many different ways. A female worker need not be propositioned, touched offensively, or harassed by sexual innuendo . . . .").

Sexual harassment is predominantly suffered by female employees. Their presence in the workplace is conditioned on a burden that male employees do not bear. *Hutchison v. Amateur Electronic Supply, Inc.*, 42 F.3d 1037, 1043 (7th Cir. 1994), discussed this situation in rejecting the employer's argument that both male and female employees were or would have been offended by the immature antics of a supervisor:

> It blinks reality to claim that sexual conduct which demeans women by a man in a position of power, even if not directed at a specific woman victim, equally impacts male and female subordinates. This disparate effect is the discriminatory element in a hostile environment.

Ignoring this reality of the workplace encourages assertion of an equal opportunity offender defense. Only in an artificial sense would a female employee's terms and conditions of employment not be different but for her sex if male employees are exposed to the same terms and conditions. Just such a distorted view of reality led the court in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), to make the unacceptable suggestion

of an equal opportunity offender defense: "It is of significance that instances of complained of sexual conduct that prove equally offensive to male and female workers would not support a Title VII charge because both men and women were accorded like treatment." The supervisor who acts out his personal animosity towards all employees should, however, be liable if the acts toward female employees were sex-related or the animosity traced to a sex-based reason for harassing a female employee and the conduct, by any objective standard, created a sexually hostile environment.

The *Vinson* decision approved the EEOC recognition of a hostile environment because "the EEOC drew upon a substantial body of judicial decision and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." 477 U.S. at 65. Although this Court later referred to "discrimination based on sex," its extensive quotation from *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982), included the passage that women could not be made to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living." 477 U.S. at 67.

In *Harris v. Forklift Systems, Inc.*, *supra*, the combination of an objective and subjective perspective demonstrates that harassment of a sexual nature inherently discriminates regardless of the harasser's motivation. The employer's specific intent was not then before the Court; however, inferring the requisite intent from harassment of a sexual nature does not depend on proof of such specific intent. Proof of a general intent to discriminate must suffice when a sexually hostile work environment has been imposed or tolerated by the employer.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

FREDERICK M. GITTES
Spater, Gittes, Schulte & Kolman
723 Oak Street
Columbus, Ohio 43205
(614) 221-1160

LOUIS A. JACOBS
4905 Stonehaven Drive
Upper Arlington, Ohio 43220
(614) 459-5690
Counsel of Record

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In The
Supreme Court of the United States

October Term, 1995

ROSE ANN ROTHENBUSCH,
Petitioner

v.

FORD MOTOR COMPANY,
Respondent

On Petition For Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Randolph H. Freking
Counsel of Record
FREKING & BETZ
225 East Sixth Street
Second Floor
Cincinnati, OH 45202
(513) 721-1975

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QUESTIONS PRESENTED

I. IS THE PLAINTIFF IN A CO-WORKER HOSTILE ENVIRONMENT HARASSMENT CASE REQUIRED TO PROVE THE DISCRIMINATORY INTENT OF HER EMPLOYER, INSTEAD OF THE CO-WORKER HARASSER, IN ORDER TO HOLD THE EMPLOYER LIABLE FOR FAILING TO END THE HARASSMENT?

II. DID PETITIONER SATISFY RULE 51 BY RAISING TIMELY OBJECTIONS TO THE JURY INSTRUCTIONS AT ISSUE IN THE PETITION FOR WRIT OF CERTIORARI?

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REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits this Reply Brief to address issues Respondent raised in its Brief in Opposition. These are issues that Respondent has never raised before throughout the long history of this case.

I. IS THE PLAINTIFF IN A CO-WORKER HOSTILE ENVIRONMENT HARASSMENT CASE REQUIRED TO PROVE THE DISCRIMINATORY INTENT OF HER EMPLOYER, INSTEAD OF THE CO-WORKER HARASSER, IN ORDER TO HOLD THE EMPLOYER LIABLE FOR FAILING TO END THE HARASSMENT?

Respondent suggested in its Brief in Opposition that the discriminatory intent of the employer is the important consideration in hostile environment harassment cases, and that the intent of the co-worker harasser is irrelevant. Petitioner suggests that if this argument has any merit, it presents another reason for this Court to review this case and clarify the elements of a hostile environment harassment claim, especially when the harasser is a co-worker and not a supervisor of the target of the harassment.

The EEOC Guidelines on Discrimination Because of Sex suggest that an employer is liable for co-worker sexual harassment where "the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d). No mention of the employer's discriminatory intent in

failing to take appropriate corrective action is made.

Petitioner has been unable to find any hostile environment harassment cases involving co-workers in which the employer was relieved of liability because it did not intentionally discriminate against the plaintiff when it failed to take action regarding her complaints of harassment. On the contrary, in those cases where the employer was held liable, no plaintiff was required to establish the discriminatory intent of her employer in preventing or failing to stop the harassment of a co-worker. See, e.g., Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959 (8th Cir. 1993); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

Respondent's argument reflects the confusion that surrounds the jurisprudence of hostile environment harassment under Title VII. Therefore, Petitioner respectfully requests this Court to review the decisions of the courts below and determine whether a hostile environment plaintiff must prove intentional discrimination, and if so, whether it is the employer's intent or the co-worker harasser's intent that must be proved.

II. DID PETITIONER SATISFY RULE 51 BY RAISING A TIMELY OBJECTIONS TO THE JURY INSTRUCTIONS AT ISSUE IN THE PETITION FOR WRIT OF CERTIORARI?

A. Petitioner raised her objection to the "personal animosity" jury instruction because it ignored the effect of the conduct on the victim

Petitioner raised her first objection to the "personal animosity" jury instruction during the charge conference. Both the Respondent and the Sixth Circuit relied on only a small portion of the discussion during the charge conference to support the contention that Petitioner did not object to the instruction. Petitioner's entire statement of her objection was:

> I think it is a very significant instruction, Your Honor. I don't have any problem with the statement "the personal animosity is not the equivalent of sexual harassment as prescribed by law", in that general concept. What I have a problem with is the last phrase of the first sentence, that "she would not have been the object of harassment but for the fact of her sex." I don't think that the -- I think there can still be sexual harassment without the motivating factor being her sex if, in fact how you harass someone is sexually offensive. In other words, if -- well, I guess I would propose "but for the fact of her sex, she would not have been subjected to the type of harassment that she complains of," or something to that effect.

After additional discussion regarding the language of the charge, and the court's decision to give the instruction as proposed by Respondent, with only minor changes, Petitioner objected once more: "I object to the end result here anyway."

Petitioner objected again during the conference considering the trial court's answer to the jury question

regarding this instruction, noting that the jury seemed to be confused by the "personal animosity" reference in the instruction:

> Your Honor, the plaintiff objected to this charge in the first place. We would propose . . . that neither of the two possible interpretations given by the jury to the definition of "equivalent," neither of those are the answer . . . . I think that's [sic] what we're getting at in this entire jury instruction is whether the claimed unlawful harassment in this case, the posters, those sexually offensive posters, were they designed or were they done in such a way because of her sex, female, if she were a male, would the posters have been of the same variety . . . .

A little later during the same discussion, Respondent argued that the motive of the harassment was the key to interpreting the "because of sex" requirement:

> [T]he legal issue . . . is what is the intent of the activity. Is the intent because it's a manifestation of personal animosity or is the intent because it's a manifestation of some sexual motive which is prohibited by law? Harassment is not the key word. That's action. The question is what's the motive? If it's harassment because you don't like somebody, that's not prescribed [sic] by law. If it's harassment because of their sex, that, then, is prescribed [sic] by law.

Petitioner then further explained her position:

> Let me give you an example that I think brings it right home. . . . If I don't like my neighbor, I just hate him because he will not let me use his volleyball net in his back yard, I have a personal animosity toward him, and to show that personal animosity, I then go and burn a cross on his front lawn because he happens to be black. I suggest to you that would be racial harassment despite the fact that [I was motivated by] my personal animosity because he won't . . . let me use his volleyball net . . . . Just like in this case it's sexual harassment because even though Mr. Meyer may have done this because he hated Rose Ann Rothenbusch's guts, he would not have -- the way he did it is based on sex because of how sexually offensive the material is and I think the racial harassment example is exactly analogous.

On appeal to the Sixth Circuit, Petitioner argued that both the instruction and the subsequent clarification from the court were in error. The Sixth Circuit ruled on this jury instruction directly, thus acknowledging that the issue was properly before it and had not been waived. Rothenbusch v. Ford Motor Co., No. 9303945 at 6-8 (6th Cir. Jul. 20, 1995).

Fed. R. Civ. P. 51 requires that, to preserve an issue regarding jury instructions for appeal, a party must object to the instruction before the jury retires, and must state "distinctly the matter objected to and the grounds for

the objection." Petitioner satisfied the requirements of Rule 51 during the charge conference, and again when discussing the court's answer to the jury's questions. Moreover, Petitioner subsequently raised the issue on appeal to the Sixth Circuit. Therefore, Petitioner has properly preserved the issue for review by this Court.

B. Petitioner objected to the "personal animosity" jury instruction and the subsequent clarification because neither allowed the jury to consider that the harasser was motivated by both personal animosity and Petitioner's sex

Although Petitioner did not state the objection using the term "mixed motives," the discussions during the charge conference and the later conference considering the jury question clearly revolved around the two potential motives for the harassment, personal animosity and Petitioner's sex, and therefore was a mixed motives argument. Petitioner's statement that "there can still be sexual harassment without the motivating factor being her sex if, in fact, how you harass someone is sexually offensive" was her explanation of how a harasser can be motivated by more than one reason.

When the court proposed that the jury's question be answered with, "[a]ct[s] of personal animosity in and of themselves are not sexual harassment but harassment must be because of sex. Please review the entire charge, including page 18," plaintiff objected once more:

> See, Your Honor . . . the problem I have with that is that "the acts of personal

> animosity in and of themselves" . . . I think the first sentence would suggest to the jury that if the acts were motivated by personal animosity, that it would not be unlawful sexual harassment. I think what we need to focus on is what acts did he commit and what nature were they and would he have directed those at a male . . . .

In this case, the Petitioner argued throughout the charge conference and the conference considering the jury question that the harasser was motivated by at least two reasons: 1) personal animosity and 2) the choice of sexually graphic harassment because of its peculiar power to wound the intended victim because of her sex. Because only one of these motives is prohibited by Title VII, this is a classic mixed motives argument.

Petitioner also argued in her brief to the Sixth Circuit that the instruction constituted error because it failed to allow the jury to consider that both motives were present. The Sixth Circuit, without much elaboration, found the jury instruction to be proper.

Petitioner satisfied the requirements of Rule 51 by objecting to the proposed jury instruction during the charge conference and the subsequent conference discussing the jury question. Moreover, Petitioner subsequently raised the issue on appeal to the Sixth Circuit. Therefore, Petitioner has properly preserved the issue for review by this Court.

C. Petitioner objected to the "comparable non-protected persons" jury instruction during the charge conference

Petitioner raised an objection to the "comparable non-protected persons" jury instruction during the charge conference, suggesting that the court add the phrase "of comparable seriousness" after the existing phrase "engaged in the same or similar conduct." Petitioner also argued in her brief to the Sixth Circuit that "Plaintiff did not need to establish that the similarly situated employees engaged in the identical conduct (i.e., assault with mace as opposed to a walkie-talkie), only that they engaged in the same or substantially similar conduct of equal seriousness."

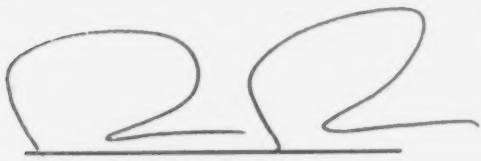
In both instances, Petitioner argued that the Mitchell test was overly harsh and restrictive. Mitchell v. Toledo Hospital, 964 F.2d 577 (6th Cir. 1992). Petitioner did not cite to the Pierce opinion because it had not yet been decided. Pierce v. Commonwealth Life Insurance Co., 40 F.3d 796 (6th Cir. 1994).

Furthermore, Petitioner also objected to the district court's exclusion of evidence of other similarly situated employees because they were not similar enough to the Petitioner under the Mitchell test. She also raised this argument in her motion for a new trial and in her brief to the Sixth Circuit. Therefore, Petitioner has properly preserved the issue for review by this Court.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Petition for Writ of Certiorari, Petitioner respectfully requests that this Writ of Certiorari be granted.

Respectfully submitted,



Randolph H. Freking
FREKING & BETZ
225 East Sixth Street
Second Floor
Cincinnati, Ohio 45202
(513) 721-1975
Counsel for Petitioner